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ABSTRACT

The present document presents an outline and discussion of a course designed to instruct students in the workings of the legal processes as related to the solving of today's urban problems. The project in its entirety resulted in a product that can be adapted to meet the needs of urban science students from several instructional points of view. Heavy emphasis is placed on the problems of urban housing, consumer protection, and welfare. The appendices of the document contain the reading materials drafted; an outline of the reading assignments, problems and games; the class diary; and some sample examination questions. (HS)

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FINAL REPORT

PROJECT NO. 9-C-060
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ROBERTA COOPER RAMO, J.D.
SHAW UNIVERSITY
RALEIGH, NORTH CAROLINA 27602

URBAN LEGAL PROCESS

JUNE 30, 1970

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U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
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FINAL REPORT

PROJECT NO. 9-C-060
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URBAN LEGAL PROCESS: DEVELOPMENT OF ORIGINAL COURSE MATERIALS TO TEACH LEGAL PROBLEM-SOLVING SKILLS AND KNOWLEDGE TO UNDER-GRADUATES IN THE URBAN SCIENCES

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U.S. DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

Office of Education
National Center for Educational Research and Development

Urban Legal Process

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PART I

SUMMARY

This Report was first submitted on June 30, 1970 to the Office of Education, National Center for Educational Research and Development, by the Project Director, Roberta Cooper Ramo. Mrs. Ramo was then a member of the faculty at Shaw University. As originally submitted the Report was divided into two separate parts bound under separate covers. Pursuant to directives from the Office of Education and in keeping with procedures for preparation of reports of this nature the entire report has been merged into one for binding.

Part I. Consists of the following Sections:

Section I: The Evolution of the Goals of the Project
Section II: Chronological Summary of How The Grant Period Was Spent.
Section III: A Critique of The Reading Materials, Problems and Games, Class Time and The Directions of the Course.
Section IV: The Future of the Urban Legal Process As a Course and The Value of the Grant.

The Background data of the project is found is Section I. The Procedure and Methodology followed in preparing the Course is indicated in Section II. Section III is a monitored account of Results as observed by the Project Director in using the material for instructional purposes in newly instituted courses in Legal Process in the School of Urban Sciences, Shaw University. Finally, Section IV projects recommendation for continuity, development and direction of the prescribed course in Legal Process as a tool for the student in Urban Sciences. As originally submitted, these Sections, along with a few others, were bound separately from the bulk of the reading materials.

Part II of this work consists of the following Appendices:

Appendix A: Prepared Reading Materials drafted during the Grant Period.
B. Written Assignments, Problems, and the Games.
C. Class Diary
D. Sample Examination Questions.

Appendix A consists of the bulk of the instructional materials. Included therein are cases, legal essays, law review articles, sample copies of legislative enactments, codes as well as copies of other documents of legal import. Several written exercises follow some of the selected material. Appendices B, C and D are self-explanatory.

The Project in its entirety resulted in a product which can be adapted to meet the needs of urban science students from several instructional points of view: heavy emphasis has been placed on problems of urban housing, consumer protection, welfare, etc. Finally, the Project attempted to adhere to its primary goal: the teaching of the American legal system with a view of employing it as an instrument for solving today's urban problems.

Urban Legal Process: An Experiment in the Reason for Teaching

I. The Evolution of the Goals of the Project.

Originally, the goals of this project were to produce a draft text dealing with Urban Legal Process using problem-solving techniques and contemporary substantive materials, and to put together an advisory manual for teachers interested in teaching the course. A change in the timing of the grant, and the experience of the project itself modified the initial goals and in many ways made them more responsive to the pressing issue of exactly what the purpose of a university education is in our times.

The major modification came in the production of written materials. Because of a three-month delay in the start of the grant, due to the government's timetable, there was a three-month period for writing and research instead of the six months outlined in the initial proposal. Because of this shortening by half of the time, the goal of that initial period of fulltime work on the course became to gather materials and do a first draft text, rather than to complete a text and a workbook for teachers. Thus, the reading materials actually produced are in first draft form and deal only with 2/3 of the subject matter which should eventually be covered. Research material, bibliography and an outline, however, were gathered for the rest of the material.

A second re-orientation came in thinking and teaching. Two factors rapidly became apparent which demanded to be dealt with in any meaningful creation of a course of this nature. The first was the extreme students' lack of knowledge and misinformation about the actual workings of the legal process. This is a phenomena not unique at Shaw, but common among college students and the general populace as well. Students simply had no idea of the true workings of the judicial process. Nor did they have any understanding of the administrative process in our society either in its impact on their lives or in its relationship to the whole system of law. There was more understanding of the nuts and bolts of the legislative process, but little understanding of the relationship that the legislative process had to the other two branches of the legal structure in our society and only the barest ideas of how preparing reading materials that presented important facts about the legal system and its use and misuse in the urban situation, but in developing models both written and in class, which forced the student to discover for himself what he did not know, what he knew incorrectly and at the heart of what I was trying to accomplish, to realize when he was operating from assumptions rather than facts. The focus was on helping the student become aware of where in the thought process it was necessary to begin questioning his own thoughts and the thoughts and actions of others in order to be most effective in achieving his goal or bettering his understanding.

The goals of the project ultimately came to be creating materials, and teaching methods, which produced a student able to understand the systems of the legal process and able to discover for himself the facts and actions necessary to understanding a particular problem and to setting out all of the alternative courses of action. In a practical sense, this meant the preparation of some written materials for reading, the development of role playing situations and games, the preparation of problems, the careful use of the classroom hour, and most difficult to articulate, the use of the time to do serious thinking about the problems of education and the legal system in our country which produced the lack of ability to analyze that is apparent among many college students, the sort of responses to the legal system that we see in this country by the young, the poor and the Black.

II. Summary of how the grant period was spent.

September, October and early November were spent in basic research. Research was done primarily at the Duke University Law School Library. I also spent several days in Chicago where I made use of the University of Chicago Law School Library which has estensive materials in the area of Urban problems. I also used the trip to go through the files of the University of Chicago Legal Aid Clinic, and through some materials at the main office of Chicago Area Legal Services program for materials for problems and the reading text.

Late November and all of December was spent putting together a rough draft of the first part of the reading materials dealing with the basic elements of the legal process: the judicial, legislative and administrative processes.

The first term of Urban Legal Process began on January 5, 1970. I had half-time free from then through May. January and February was used to put together the chapters on Housing and Consumer Credit. March, April and May were spent in developing the problems and the games, and in doing research in the other areas that I intend to cover in the materials in the future.

June was spent in preparing the final report and analyzing the terms of teaching the course.

III. A Critique of the Reading Materials, Problems and Games, Class Time and Director of the Course.

A. Reading Materials.

One of the goals of the course was to devise the beginning of a text for Urban Legal Process that could be used by undergraduates and non-law school graduate students. It had become apparent during the proceeding year that the texts available in the general area of legal process or urban legal problems were either too far away from the mark in subject matter or law school case books. Most of the political science texts dealing with the legal process were heavily oriented with theory and had little or nothing to say about contemporary legal problems, the revolution in legal theory and activity brought about by the legal services programs of OEO. Too, they were straight textual and case material with little to offer in the way of introduction to the praticalities of the legal process with which most students and most city dwellers are most often confronted.

My goal was to create a set of materials which would give some idea of the structural functioning and the style of operation of the legal process as it operated in the context of contemporary urban society in this country, and in particular, how the legal process operated in theory and in reality upon or for the poor citizen. A second, but not secondary objective, was to try something other than straight exposition to do the teaching. For the most part, I did not, and do not, believe that for most university students, reading straight textual material is much different than listening to a lecture. Both are essentially passive experiences and some other device is needed to make the process one of intellectual growth and activity. To reiterate, my goals for the reading materials were twofold. I wanted to attempt to present materials which would illuminate the actual working of the legal process in this country, would offer insights into the operations of the legal process in practical situations in the urban setting, and would do this in a way which would make the student an active analyst, rather than a passive information receptor.

Because of the limitation in time there was a clear limit to the range of subjects for which I could prepare materials. I decided to devote my time and the materials to an introduction to the various facets of the structure and style of the legal process in this country and to a presentation of two subject matter areas that were relevant to the general topic of urban legal problems. These two areas were housing and consumer credit. Since I anticipated discussion of the welfare system during the study of the administrative process and of juvenile and criminal problems during the discussion of the judicial process, this enabled me to forecast a reasonable coverage of the subject that I had first envisioned in my grant.

In order to test the adequacy of various kinds of reading materials I combined several types in the materials prepared and used during the class time. The materials themselves, consist of original text and problems, edited case reports of appellate courts, edited articles, examples of various relevant statutes, regulations and legal materials such as leases and consumer credit contracts.

A number of the articles simply didn't work. Some of them, while excellent presentation of the legal issues, were too professionally-oriented. The articles that made the greatest impact were the "how-to" articles such as the Yale Law Journal article on tenants union. Another article which was very well received and caused much productive discussion was the Craig Karpel article dealing with the realities of consumer fraud in New York City. This discussion was particularly good as an introduction to the truth-in-lending bill and as an example of the various sorts of problems that the size of the city makes particularly difficult. In future drafts of the materials, the investigator plans to replace the long articles on the Legislative process and public housing with original text.

The appellate case reports worked very well. First, they are an excellent vehicle for teaching analysis of written material. The classes were instructed in the method of briefing a case in order to give them some tools with which to attack the meaning of the case reports. Because of their presentation of extremely common and relevant fact situations, the classes seemed particularly interested in analyzing how the legal process had dealt with the issues. Many of the cases offered an opportunity to see the legislative, administrative and judicial branches of the process deal with a single issue.

Two important issues were not covered in detail in the text, but which were the focus of much class discussion. They are the Constitution and Constitutional Law as part of the framework of the legal process, and in depth discussion of the jury system in the portion of the materials devoted to the judicial process. In the future there should be a more clearly articulated discussion of the Constitution and its relationship to the issues discussed within the context of the written materials. The question of the jury trial and the workings of the jury in our society was the subject of intensive analysis and discussion during the class period. In order to make sure that this discussion takes place in other offerings of the course the text needs an added section dealing with the various questions and problems posed by the jury system. This section should not, however, be more than a simple presentation of the issues. This will help to assure a more lively discussion of the issues by not inhibiting the students by presenting an author's view of the system.

The student's response to the text, both during the class term and in the evaluations turned in at the conclusion of the course was generally excellent. There was some questioning of the use of the Speluncian case on the grounds of its difficulty, but the class response at the time we used the case was indication of its value in spite of some anxiety that it produced on the part of students. The students were most interested in the cases and the presentation of the lease and the consumer credit contracts. They also enjoyed the variety of materials presented and suggested that this variety not be eliminated from the final drafts in favor of straight exposition. They indicated much anxiety at the beginning of the course when they realized that they were going to read actual law cases. However, they seem to have all grasped the ability to analyze the cases by the end of the term and the class discussion and written assignments through the course indicated their active interest in using case opinions as a basis for learning.

An additional change in the materials that is planned is the shortening of the chapters on housing and consumer credit so that the materials dealing with other issues in urban legal process may be presented in the context of a semester's work.

B. Problems and Games.

There was no more rewarding part of the grant period than noting the increased intellectual proficiency and maturity that was shown by the students' performance on the problems. Two sorts of problems which required written work were assigned. The first assignments were problems which were read aloud to the class; the others were presented in written form. All of the problems were designed to have three objectives. The first was to improve the students' ability to recognize, analyze and question a legal situation. The second was to help him learn some factual material about a specific legal topic. The third was to serve as the focus for in-class analysis of the problem and the students' written responses to them.

Two written assignments were read out-loud (See Appendix B, Written Assignment # 2). This device was chosen to achieve two goals. First, it was designed to encourage the development of the skills of listening to an oral presentation carefully and recording the most important parts of it without error. This is particularly important for students who are planning to work in the urban community. There is no time to make community leaders, or people who come for help, go over and over their stories or problems or ideas again and again until the professional worker has copied them down word for word. At the same time when dealing with issues which are often highly emotionally charged and which relate to the legal process, there is little room for factual error. The reason for the oral assignments was carefully explained and discussed with the students before each reading. This called their attention to the fact that listening and recording was a skill that was being practiced to make it possible to improve their ability in the area.

The second reason for oral assignments was to show the students the great number of assumptions and biases which operated in their hearing of "what was really said." An oral assignment and reading of the fact situation best simulated a meeting between a community worker and an individual or a group with the added analytic advantage of being able to refer later to a written statement of exactly what was read to show just how many and what sort of assumptions each student had made which were not based on fact. An example of the sorts of assumptions that students made, was the common inclusion in written assignment 1 of the "fact" that Miss Wilma Welfare was Black. This was an assumption that had no basis in the materials that were actually read. Another assumption commonly made in that assignment was that Miss Welfare had been evicted because of her son's window breaking or her own activity as a tenants union organizer. When the students realized that none of those "facts" had a basis in what had actually been read, they began to start questioning their own analysis and affording a real breakthrough in teaching legal analysis.

The written assignments which were handed out, were also very successful in terms of their fulfilling the goals which had been set. The students had to analyze fact situations and apply them to the various parts of the legal process. Their ability to ferret out the possible alternatives within the system for obtaining their objectives improved greatly with each assignment. Additionally, the problems opened up discussions of the substance of the law in the various areas of urban problems and gave them a chance to discover through questioning and reading the answer to many questions about how the process actually worked in a given area.

The legislative lobbying game was extremely successful during the first term, and only moderately so during the second. One of the problems with the game was that it was difficult for some students to assume roles which were far from their own identities. This problem might be dealt with more easily in a well integrated class. Another problem was the anxiety about what they were supposed to be doing, that attacked many of the students who were used to a very rigid classroom situation. In general, however, the students felt, after the game had been played through, that there were a number of values to both the method and the subject of the game. One of the most important insights was into the difficulty of creating legislative language to fit a particular situation. Another added bonus was greater understanding of the relationship between the legislative process and the various power groups that operate in any state. This was particularly important when the class began to discuss the problem of the cities in state legislatures that are largely dominated by rural interests. The students referred to the game frequently in our discussion of the legislative process that followed.

A second game was initiated around the housing problem dealing with the drafting of an agreement between a landlord and a tenants union. The actual negotiation was an excellent introduction into the whole area of negotiation with a legal background as an instrument of achieving a goal. During the playing out of this game, the instructor assumed the role of a lawyer in the community legal services office. The student began to realize the positive role of the lawyer in a dispute that had not gone through the courts and also realized their responsibility in making policy decisions and assessing risk-taking factors.

In summary, the problems and games seemed to fulfill the highest expectations of them. They served to change the role of the student from passive listener to active participant. They served as practice for situations that the students anticipated would be theirs upon graduation. The problems served as the groundwork for teaching analysis and also introduced the student to a variety and amount of substantive that would not have been in his grasp had they been presented in lecture or even in textual form.

C. The Classroom Hour.

It is clear that much more substance could have been covered had the material been presented in lecture form. However, the achievement of the classroom hours were great enough to more than make up for the limitation in subject matter that resulted. The main technique in the classroom was the Socratice method, based upon the reading materials and problems. This caused some anxiety for students who were not used to carrying the burden of thinking and responding in the classroom. (One student when responding to the evaluation form"s question, "What did you like least in the course?" replied, "I never knew when something I said was right.") That the students felt the class time important could be measured in two ways. First, class attendance throughout both terms was generally at about 90%. This is far higher than ever shown in any other class that the investigator had taught at this instituion operation under the same attendance rules. Secondly, the evaluation forms showed almost unanimous approval of the way that the classroom hour was spent.

Another advantage of the style of the materials and the class was that it allowed for great flexibility in discussing legal issues which the class brought up from their experiences and from their knowledge of what was happening around the country in general and in Raleigh's Black community in particular. Some of the most important discussions were about such issues as the Chicago Seven Trial, a change in the housing code in Raleigh and a recent bond issue concerning Urban Renewal of the Raleigh Southside community, which is predominantly Black.

As the Class Diary (See Apendix C) indicates roughly, the initiation of discussions based on very pragmatic questions lead to a much deeper probing and discussion of basic theoretic questions of the legal process than was expected. More importantly, it was the students doing the analysis and the questioning, rather than simply listening to the instructor recite favorite theories.

The materials and the problems served as the touch stone for classwork in which the student became the discoverer and questioner and at the same time seemed to learn a good deal of substantive material about the workings of the American Legal Process in the urban situation.

D. The Direction of the Course.

The urban direction of the course, with its emphasis on problems of the poor seems to be a correct charting. It enables the student to learn the basic theories of the legal process in the context of substance which is importent to his future as a concerned citizen and which more importantly helps him to understand the problems that the process has faced in the past and the sort of stresses to which it will be subjected in the future.

The main difficulty was the lack of time to work all of the way through the subject matter originally intended to be covered. This would be avoided by either making the course a two-term course, or a full semester course that meets four times a week. This would also give the instructor the time to work more clinical experiences into the course. Originally, it was anticipated that there would be a legal services clinic on the campus which would provide the students with practical experience and observations of various kinds. This clinic was not opened. While the problems substituted for much of the material that might have been explored within the clinic situation, there is no substitute for reqlity. Arranging trips to court is another area which should be included in the course, and a longer period in which to teach would also make this possible.

These trips should include exposure to a trial including the important voir dire procedure and to an appellate court. The main obstacle, in addition to time, is assuring that the cases which are heard are relevant to the material covered in the course. This was almost impossible to achieve in Raleigh because of the lack of legal services to the poor, but should be done with some alacrity in most other cities.

The class did take, both terms, a trip to the Duke University Law Library. While there, the class toured the library and more importantly, learned how legal research operates and how to look up a law or regulation themselves. The response to the trip and the teaching there was quite positive and many of the students from the first term of the class went to the Law Library in Raleigh during the Spring term to find regulations and statutes on their own.

In sum, the course responded to two pressing needs. It offers substantive material which explains the legal process, its strengths, weaknesses, in a way which relates to the issues about which students and much of the general population is presently concerned. Secondly, it develops in the student a sense that he can manipulate the legal process in its various manifestations and not merely be manipulated by it.

IV. The Future of Urban Legal Process As a Course and the Value of the Grant.

One of the most important results of the grant was it enabled a faculty member of a small university to take some time to think about and practice innovative teaching methods in a new course. Although new courses are continually introduced at Shaw and other universities, it is the rare wealthy institution that enables the faculty member to create something worthwhile and workable that is new. It is much easier to teach from other people outlines, to lecture rather than teach and to use old or traditional teaching materials. There are areas in which the traditional method is, of course, most appropriate to the subject matter and there are traditional subject matters which must remain at the heart of a university education.

However, the legal profession and the university system has by-and-large ignored the necessity of teaching about the legal process as something more than a political science theory to those not in law school itself. One of the results of this abandonment has been much ignorance among otherwise well-educated people about how the legal process works. Operating on misinformation or ignorance has caused another result; that it attacks against the entire legal system which are not based on adequate information or careful analysis.

It was particularly interesting to develop the course at a Black university. The students here have, because of their race and economic situation, far more exposure in their own lives to the workings of the legal process than most white college students. The course seemed to give them some tools with which they were anxious to work in their own situations, as well as in the community at large. One of the most rewarding moments of the grant period came during a teach-in on the legal process when the students from Urban Legal Process class enlightened their fellows about misconceptions they had about the actual workings of the process and at the same time, were able to discuss the failings of the process and possible solutions in an informed and pragmatic way.

The course seems well based for teaching objective analysis. The students came away with some understanding of how lawyers work and think and how they can best be used. More importantly, the students realized that they are not, nor are the poor and the Black and the city dweller, necessarily prisoners of the legal process. It seems clear from the response of the students and of faculty members at other institutions that it is imperative that a course on contemporary legal process be included routinely in the curriculum of most undergraduates. Clearly, it should be required of those undergraduate and graduate students who will have some responsibility in dealing with the problems of the urban community or the poor.

The work accomplished during the grant period is an important foundation for future development. The course will continue to be taught at Shaw and there have been expressions of interest from several other undergraduate faculties and several graduate schools of social work or social administration. The principle investigator is now approaching several foundations to make it possible to find a vehicle that will encourage the inclusion of the course at other institutions. Additionally, the principle investigator plans to finish a complete and more final draft of the reading materials as a textbook in order to have it ready for possible publication and adoption for the 1971-72 academic year, in the hopes that having the book easily available will also serve as a way of spreading the teaching of legal process.

One problem that must be faced is that of who can actually teach the course properly. The experience of two terms of teaching makes it difficult to believe that the course could be taught by someone who is not a lawyer with the same flexibility that is important in achieving the goals of the course. An answer to that problem might be in encouraging faculty members from law schools to give the course to undergraduates in affiliated colleges, or to encourage qualified lawyers dealing with the problems of the poor and the urban community to teach the course on part-time appointment to college and university faculties.

Paul Freund pointed to the vital importance of a course of this sort when he wrote in Daddalus: The Professions, p. 700 Fall, 1963, " . . .Law is probably the most neglected phase of our culture in the liberal arts curriculum. Yet the legal profession no less than the scientific, functions in a lay society that does, and should, judge its performance. If this judgement is to be effective, it must be based on knowledge of the role of the profession and the character of its thinking. General education requires that somehow a view from the inside should be provided of this profession as of other learned disciplines."

Additional proof of the desparate need for understanding the legal process may be found by looking at the cries of students that the "system" respond to the needs of the people. Students must be helped to find how the system of the legal process operates and how they can use it to achieve their goals. If their cries are not heeded in the classroom, then we should not be surprised of their rejection of the system. If the legal system fails to serve the goals of students, and poor people, of Black Americans and of city dwellers, then it will fail for everyone and the American dream will no longer contain a democratic legal process with justice and rationality as its corner stone. The university and the classroom offers an important place to begin making the legal process responsive and rational for all. The materials developed and the course originated under this grant should help to achieve those goals.

PART II
APPENDICES

APPENDIX A

READING MATERIALS DRAFTED DURING THE GRANT PERIOD

I. Introduction - - The American Legal Process

Most Americans think only of courts and trials when they consider the uses of the legal process. However, only a small part of our legal process is involved in the trial of cases. The legal process is a system involving the drafting and enacting of legislation, the administration of the laws and regulations of the federal, state and local governments and the judicial process. None of these areas work independently of the others. The laws are interpreted by both the courts and administrative agencies. Law is made by judges and administrators as well as legislatures. Legislatures and administrative agencies both respond to what the courts do. All facets of the process must be examined in considering the impact of the legal process on urban problems and the potential of the legal process for coping with present crises and future planning.

The term legal process as it is used in this book indicates the full range legally recognized systems by which the society governs itself and with which the individual or the group can try to achieve specific individualized goals. The materials deal with the legal process in the specialized factual context, of the urban lower income community. The urban situation has been selected for emphasis because of the special nature of the problems that are posed by large concentrations of people in relatively small areas.

Another point of focus is the low income citizens of the city. They tend to be historically the least powerful members of the community and so have the least amount of individual or group influence upon any part of the legal system. Too, low income citizens have the greatest number of contacts with the legal process and ironically, the least resources to cope with those contacts.[1]

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[1] [Among the most intense grievances underlying the riots of the summer 1967 were those which derived from conflicts between ghetto residents and private parties, principally the white landlord and merchant. Though the legal obstacles are considerable, resourceful and imaginative use of available legal processes could contribute significantly to the alleviation of tensions resulting from these and other conflicts. Moreover, through the adversary process which is at the heart of our judicial system, litigants are afforded meaningful opportunity to influence events which affect them and their community. However, effective utilization of the courts requires legal assistance, a resource seldom available to the poor.

Litigation is not the only need which ghetto residents have for legal service. Participation in the grievance procedures suggested above may well require legal assistance. More

Many of the difficulties that face the poor are the same that affect the more affluent members of our society. Conflicts about leasing arrangements, difficulties with contracts, marital problems are all part of the life of many Americans. The difference between the poor and the more affluent is that the poor man usually cannot afford legal representation, and often has no idea of his rights. This has effectively foreclosed the use of the legal system, and the orderly procedure that it implies to settle his conflicts. The poor citizen also has less personal facility in dealing with bureaucrats who frequently have much control over his life. Finally, the poor citizen has less chance to make his needs heard by the legislative branches of the government, be it the Congress or the City Council.

These handicaps have not been lost on those who deal regularly with poor people. It is common to find landlords enforcing by threat leases that are clearly illegal according to the laws and courts of the state. It is common to find merchants using consumer credit contracts that are blatant violations of the law. Even some government agencies may knowingly or by negligence act in unconstitutional ways when dealing with poor people. All of that treatment is in part, the result of the fact that the poor person has been almost powerless, by ignorance or lack of representation or fear, to manipulate and use the legal process himself.

Much of the frustration that has recently been evidenced in civil disorders and deep disenchantment with America can be traced to the belief, tragically reinforced by experience, that society is stacked with all of the odds against the poor and with the rules of the game subject to change at the will of the affluent. However, the use of the legal process by and for the less affluent citizen may offer an alternative to frustration, an orderly effective response to abuse and an opportunity to pursue just resolutions with the dignity of responsible citizenship. As the materials which follow indicate, the legal process can be used as an instrument of social change. The system of law in this country lends itself, some people believe it demands, to use as an effective tool for solving many of the practical and personal problems and crises of the low income dweller.

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importantly, ghetto residents have need of effective advocacy of their interests and concerns in a variety of other contexts, from representation before welfare agencies and other institutions of government to advocacy before planning boards and commissions concerned with the formulation of development plans. Again, professional representation can provide substantial benefits in terms of overcoming the ghetto resident's alienation from the institutions of government by implicating him in its processes. Although lawyers function in precisely this fashion for the middle-class clients, they are too often not available to the impoverished

In order to achieve this fuller use of the legal process two groups of educated people must come into existence. The first, already responsible for many of the changes in the lives of low income people, is a group of lawyers dedicated to making the legal process work as well for welfare recipients as for large corporations. There are now many legal services offices throughout the country working daily on the legal problems of thousands of poor people and responding in terms of long range law reform as well as the solving of the individual client's problem.

The second group must be the non-lawyers who work with the same population and hence cope at different stages with the same problems. These are the welfare workers, the community action organizers, the social workers and psychologists, the teachers and the ministers who are involved in the life patterns of the low income community. It is to this group that this book is addressed.

The purpose of the book is not to make lawyers out of lay people, but to enable laymen to better use the lawyers that are available and to better analyze the situations with which they are faced in order to determine the best options for action. The book deals with several kinds of material each intended to accomplish a specific goal. There are, for example, articles dealing with legal analysis. The greatest skill that lawyers have is the ability to make objective critical analyses of the situations with which they are confronted. It is impossible to understand the workings of the legal process, particularly the judicial expressions of the process, without come sensitivity legal reasoning. Critical thinking in emotion-filled crises situations is a valuable skill for anyone and so the materials dedicated to explaining and teaching this skill have a second value to the student apart from their explanatory purpose. There are background materials which explain the framework of the legal process. One cannot be expected to understand what the legal process does in a specific instance or with a set of problems without understanding how the various parts of the system operate individually and in concert.

The specific substantive materials are organized in four areas, housing, welfare, consumer credit and a set of materials dealing briefly with several other representative problems. These areas have been chosen both to give the student some idea of how the legal process operates in specific areas in which he may find himself operating as a lay person and because they give a representative of how the whole process works in a single substantive area. The point of these materials is not to teach the student "The Law" because the law changes all of the time, but

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ghetto resident. (U.S. Riot Commission Report "Bantam Books," March, 1968, pp. 292-3)]

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rather to indicate how the law categorizes problems and comes to its decisions. Finally, there are problems for the student to work through himself. There are no right answers, but only a right method. The point of forcing the student to solve them is to put him in a role which he may occupy after his formal educational process is completed, or to help him understand the roles that others, lawyers for example, will play so that he may better use his own talents and advise his own clients.

The goal of these materials is to give lay students some feeling for the actual workings of the legal process and to accomplish a task which Paul Freund, a prominant legal scholar, outlined in an article on the legal profession:

> "...law is probably the most neglected phase of our culture in the liberal arts curriculum. Yet the legal profession, no less than the scientific, functions in a lay society that does, and should, judge its performance. If this judgement is to be effective, it must be based on knowledge of the role of the profession and the character of its thinking. General education requires that somehow a view from the inside should be provided of this profession as of other learned disciplines." (Daedalus. "The Professions." Fall, 1963. "The Legal Profession.," p. 700. Paul Freund.)

II. Comments on Legal Analysis

Fundamental to the system of the legal process is the specialized way of looking at problems and analysing them that lawyers have. That particular process of logic and reasoning will be called legal analysis. Lawyers influence the making of law in legislatures and administrative agencies as well as in the courts. Thus understanding how lawyers think and arrive at answers to problems is basic to understanding how the legal process works, and to understanding how to make it work to achieve particular goals in the future.

Legal analysis is a difficult skill. Law schools spend three years teaching students how to think like lawyers. One can in a relatively short time, however, get some insight into the kinds of things that lawyers think about when they are trying to deal with a problem and can begin to include some of the basic concepts of legal analysis into their own analysis.

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Learning about legal reasoning is important for two reasons. First because it is vital to understanding anything about the legal process. Secondly because it is a skill valuable to anyone engaged in thinking about or making decisions about problems in our society.

The following excerpt from Edward Levi's book Introduction to Legal Reasoning deals in the framework of decisions made by judges, but it is equally applicable to the other areas of the legal process:

> "This is an attempt to describe generally the process of legal reasoning in the field of case law and in the interpretation of statutes and of the constitution. It is important that the mechanism of legal reasoning should not be concealed by its pretense. The pretense is that the law is a system of known rules applied by a judge; the pretense has long been under attack. In an important sense legal rules are never clear, and, if a rule had to be clear before it could be imposed, society would be impossible. The mechanism accepts the differences of view and ambiguities of words. It provides for the participation of the community in resolving the ambiguity. On serious controversial questions, it makes it possible to take the first step in the direction of what otherwise would be forbidden ends. The mechanism is indispensable to peace in a community.
>
> The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. This is a method of reasoning necessary for the law, but it has characteristics which under other circumstances might be considered imperfections.
>
> These characteristics become evident if the legal process is approached as though it were a method of applying general rules of law to diverse facts--in short, as though the doctrine of precedent meant that general rules, once properly determined, remained unchanged, and then were applied, albeit imperfectly, in later cases. If this were the doctrine, it would be disturbing to find that the rules change from case to case and are remade with each case Yet this change in the rules is the indispensable dynamic quality of law. It occurs because the scope of a rule of law, and therefore its meaning, depends upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process.

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The determination of similarity or difference is the function of each judge. Where case law is considered, and there is no statute, he is not bound by the statement of the rule of law made by the prior judge even in the controlling case. The statement is mere dictum, and this means the judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important. It is not what the prior judge intended that is of any importance; rather it is what the present judge, attempting to see the law as a fairly consistent whole, thinks should be the determining classification. In arriving at his result he will ignore what the past thought important; he will emphasize facts which prior judges would have thought made no difference. It is not alone that he could not see the law through the eyes of another, for he could at least try to do so. It is rather that the doctrine of dictum forces him to make his own decision.

Thus it cannot be said that the legal process is the application of known rules to diverse facts. Yet it is a system of rules; the rules are discovered in the process of determining similarity or difference. But if attention is directed toward the finding of similarity or difference, other peculiarities appear. A working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification. The existence of some facts in common brings into play the general rule. If this is really reasoning, then by common standards, thought of in terms of closed systems, it is imperfect unless some overall rule has announced that this common and ascertainable similarity is to be decisive. But no such fixed prior rule exists. It could be suggested that reasoning is not involved at all; that is, that no new insight is arrived at through a comparison of cases. But reasoning appears to be involved; the conclusion is arrived at through a process and was not immediately apparent. It seems better to say that there is reasoning, but it is imperfect.

Therefore it appears that the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, create the rules and then applies them. But this kind of reasoning is open to the charge that it is classifying things as equal when they are somewhat different, justifying the classification by rules made up as the reasoning or classification proceeds. In a sense all reasoning is of this type, but there is an additional requirement which compels the legal process to be this way. Not only do new situations arise, but in addition people want change. The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas. And this is true even where legislation or a constitution is involved. The words used by the legislature or the constitutional convention must come to have new meanings. Furthermore, agreement on any other basis would be impossible. In this manner the laws come to express the ideas of the community and even when written in general terms, in stature or constitution, are molded for the specific case.

But attention must be paid to the process. A controversy as to whether the law is certain, unchanging, and expressed in rules, or uncertain, changing, and only a technique for deciding specific cases misses the point. It is both. Nor is it helpful to dispose of the process as a wonderful mystery possibly reflecting a higher law, by which the law can remain the same and yet change. The law forum is the most explicit demonstration of the mechanism required for a moving classification system. The folklore of law may choose to ignore the imperfections in legal reasoning, but the law forum itself has taken care of them.

What does the law forum require? It requires the presentation of competing examples. The forum protects the parties and the community by making sure that the competing analogies are before the court. The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences have been urged. In this sense the parties as well as the court participate in the law making. In this sense, also, lawyers represent more than the litigants.

Reasoning by example in the law is a key to many things. It indicates in part the hold which the law process has over the litigants. They have participated in the law making. They are bound by something they helped to make. Moreover, the examples or analogies urged by the parties bring into the law the common ideas of the society. The ideas have their day in court, and they will have their day again. This is what makes the hearing fair, rather than any idea that the judge is completely impartial, for of course he cannot be completely so. Moreover, the hearing in a sense compels at least vicarious participation by all the citizens, for the rule which is made, even though ambiguous, will be law as to them.

Reasoning by example shows the decisive role which the common ideas of the society and the distinctions mady by experts can have in shaping the law. The movement of common or expert concepts into the law may be followed. The concept is suggested in arguing difference or similarity in a brief, but it wins no approval from the court. The idea achieves standing in the society. It is suggested again to a court. The court this time reinterprets the prior case and in doing so adopts the rejected idea. In subsequent cases, the idea is given further definition and is tied to other ideas which have been accepted by courts. It is now no longer the idea which was commonly held in the society. It becomes modified in subsequent cases. Ideas first rejected but which gradually have won acceptance now push what has become a legal category out of the system or convert it into something which may be its opposite. The process is one in which the ideas of the community and of the social sciences, whether correct or not, as they win acceptance in the community, control legal decisions. Erroneous ideas, of course, have played an enormous part in shaping the law. An idea, adopted by a court, is in a superior position to influence conduct and opinion in the community; judges, after all, are rulers. And the adoption of an idea by a court reflects the power structure in the community. But reasoning by example will operate to change the idea after it has been adopted.

Moreover, reasoning by example brings into focus important similarity and difference in the interpretation of case law, statutes, and the constitution of a nation. There is a striking similarity. It is only folklore which holds that a statute if clearly written can be completely unambiguous and applied as intended to a specific case. Fortunately or otherwise, ambiguity is inevitable in both statute and constitution as well as with case law. Hence reasoning by example operates with all three. But there are important differences. What a court says is dictum, but what a legislature says is a statute. The reference of the reasoning changes. Interpretation of intention when dealing with a stature is the way of describing the attempt to compare cases on the basis of the standard thought to be common at the time the legislation was passed. While this is the attempt, it may not initially accomplish any different result than if the standard of the judge had been explicitly used. Nevertheless, the remarks of the judge are directed toward describing a category set up by the legislature. These remarks are different from ordinary dicta. They set the course of the statute, and later reasoning in subsequent cases is tied to them. As a consequence, courts are less free in applying a statute than in dealing with case law. The current rationale for this is the notion that the legislature has acquiesced by legislative silence in the prior, even though erroneous, interpretation of the court. But the change in reasoning where legislation is concerned seems an inevitable counsequence of the division of function between court and legislature, and, paradoxically, a recognition also of the impossibility of determining legislative intent. The impairment of a court's freedom in interpreting legislation is reflected in frequent appeals to the constitution as a necessary justification for overruling cases even though these cases are thought to have interpreted the legislation erroneously.

Under the United States experience, contrary to what has sometimes been believed when a written constitution of a nation is involved, the court has greater freedom than it has with the application of a statute or case law. In case law, when a judge determines what the controlling similarity between the present and prior case is, the case is decided. The judge does not feel free to ignore the results of a great number of cases which he cannot explain under a remade rule. And in interpreting legislation, when the prior interpretation, even though erroneous, is determined after a comparison of facts to cover the case, the case is decided. But this is not true with a constitution. The constitution sets up the conflicting ideals of the community in certain ambiguous categories. These categories bring along with them satellite concepts covering the areas of ambiguity. It is with a set of these satellite concepts that reasoning by example must work. But no satellite concept, no matter how well developed, can prevent the court from shifting its course, not only be realigning cases which impose certain restrictions, but by going beyond realignment back to the overall ambiguous category written into the document. The constitution, in other words, permits the court to be inconsistent. The freedom is concealed either as a search for the intention of the framers or as a proper understanding of a living instrument, and sometimes as both. But this does not mean that reasoning by example has any less validity in this field.

II

It may be objected that this analysis of legal reasoning places too much emphasis on the comparison of cases and too little on the legal concepts which are created. It is true that similarity is seen in terms of a work, and inability to find a ready word to express similarity or difference may prevent change in the law. The words which have been found in the past are much spoken of, have acquired a dignity of their own, and to a considerable measure control results. As Judge Cardozo suggested in speaking of metaphors, the word starts out to free thought and ends by enslaving it. The movement of concepts into and out of the law makes the point. If the society has begun to see certain significant similarities or differences, the comparison emerges with a word. When the word is finally accepted, it becomes a legal concept. Its meaning continues to change. But the comparison is not only between the instances which have been included under it and the actual case at hand, but also in terms of hypothetical instances which the word by itself suggests. Thus the connotation of the word for a time has a limiting influence--so much so that the reasoning may even appear to be simply deductive.

But is is not simply deductive. In the long run a circular motion can be seen. The first stage is the creation of the legal concept which is build up as cases are compared. The period is one in which the court fumbles for a phrase. Several phrases may be tried out; the misuse or misunderstanding of words itself may have an effect. The concept sounds like another, and the jump to the second is made. The second stage is the period when the concept is more or less fixed, although reasoning by example continues to classify items inside and out of the concept. The third stage is the breakdown of the concept, as reasoning by example has moved so far ahead as to make it clear that the suggestive influence of the word is no longer desired.

The process is likely to make judges and lawyers uncomfortable. It runs contrary to the pretense of the system. It seems inevitable, therefore, that as matters of this kind vanish into matters of degree and then entirely new meanings turn up, there will be the attempt to escape to some overall rule which can be said to have always operates and which will make the reasoning look deductive. The rule will be useless. It will have to operate on a level where it has no meaning. Even when lip service is paid to it, care will be taken to say that it may be too wide or too narrow but that nevertheless it is a good rule. The statement of the rule is roughly analogous to the appeal to the meaning of a statute or of a constitution, but it has less of a function to perform. It is window dressing. Yet it can be very misleading. Particularly when a concept has broken down and reasoning by example is about to build another, textbook writers, well aware of the unreal aspect of old rules, will announce new ones, equally ambiguous and meaningless, forgetting that the legal process does not work with the rule

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but on a much lower level."*

As you read the cases and problems which follow keep Levi's three step reasoning process in mind. Another important concept that you must continually use is that lawyers and the law require that you analyze situations from an emotionless basis. There is no such thing as saying A must win a suit from B because it is right. If you are arguing for A you must analyze the situation as though it was B for whom you worked. This will insure that you will have no defense against B's arguments and will lack the objectivity necessary to prepare a good case for A. Don't make up your mind about the best possible choice of solutions, or about what a court will do, until you have considered all of the relevant facts and as many possible deductions as you can prepare. The next case, a brilliant fabrication by a law school professor, should give you some idea of how many approaches a single court could have to the same problem. After you read the facts, prepare a written decision of your own. Then read the judges' opinions and see if you have changed your mind.

The Speluncean case begins on page 12. After reading the opinions prepare a paper attacking your first decision.

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THE SPELUNCEAN EXPLORERS by Lon L. Fuller

In The Supreme Court of Newgarth, 4300

THE DEFENDANTS, having been indicted for the crime of murder, were convicted and sentenced to be hanged by the Court of General Instances of the County of Stowfield. They bring a petition of error before this Court. The facts sufficently appear in the opinion of the Chief Justice.

TRUEPENNY, C. J. The four defendants are members of the Speluncean Society, an organization of amateurs interested in the exploration of caves. Early in May of 4299 they, in the company of Roger Whetmore, then also a member of the Society, penetrated into the interior of limestone cavern of the type found in the Central Plateau of this Commonwealth. While they were in a position remote from the entrance to the cave, a landslide occurred. Heavy boulders fell in such a manner as to block completely the only known opening to the cave. When the men discovered their predicament they settled themselves near the obstructed entrance to wait until a rescue party should remove the detriutus that prevented them from leaving their underground prison. On the failure of Whetmore and the defendants to return to their homes, the Secretary of the Society was notified by their families. It appears that the explorers had left indications at the headquarters of the Society concerning the location of the cave they proposed to visit. A rescue party was promptly dispatched to the spot.

The task of rescue proved one of overwhelming difficulty. It was necessary to supplement the forces of the original party by repeated increments of men and machines, which had to be conveyed at great expense to the remote and isolated region in which the cave was located. A huge temporary camp of workmen, engineers, geologists, and other experts was established. The work of removing the obstruction was several times frustrated by fresh landslides. In one of these, ten of the workmen engaged in clearing the entrance were killed. The treasury of the Speluncean Society was soon exhausted in the rescue effort and the sum of eight hundred thousand frelars, raised partly by popular subscription and partly by legislative grant, was expended before the imprisoned men were rescued. Success was finally achieved on the thirty second day after the men entered the cave.

Since it was known that the explorers had carried with them only scant provisions, and since it was also known that there was no animal or vegetable matter within the cave on which they might subsist, anxiety was early felt that they might meet death by starvation before access to them could be obtained. On the twentieth day of their imprisonment it was learned for the first time that

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they had taken with them into the cave a portable wireless machine capable of both sending and receiving messages. A similar machine was promptly installed in the rescue camp and oral communication established with the unfortunate men within the mountain. They asked to be informed how long a time would be required to release them. The engineers in charge of the project answered that at least ten days would be required even if no new landslides occurred. The explorers then asked if any physicians were present, and were placed in communication with a committee of medical experts. The imprisoned men described their condition and the rations they had taken with them, and asked for a medical opinion whether they would be likely to live without food for ten days longer. The chairman of the committee of physicians told them that there was little possibility of this. The wireless machine within the cave then remained silent for eight hours. When communication was reestablished the men asked to speak again with the physicians. The chairman of the physicians' committee was placed before the apparatus, and Whetmore, speaking on behalf of himself and the defendants, asked whether they would be able to survive for ten days longer if they consumed the flesh of one of their number. The physicians' chairman reluctantly answered this question in the affirmative. Whetmore asked whether it would be advisable for them to cast lots to determine which of them should be eaten. None of the physicians present was willing to answer the question. Whetmore then asked if there were among the party a judge or other official of the government who would answer this question. None of those attached to the rescue camp was willing to assume the role of advisor in this matter. He then asked if any minister or priest would answer their question, and none was found who would do so. Thereafter no further messages were received from within the cave, and it was assumed (erroneously, it later appeared) that the electric batteries of the explorers' wireless machine had become exhausted. When the imprisoned men were finally released it was learned that on the twenty-third day after their entrance into the cave Whetmore had been killed and eaten by his campanions.

From the testimony of the defendants, which was accepted by the jury, it appears that it was Whetmore who first proposed that they might find the nutirment without which survival was impossible in the flesh of one of their own number. It was also Whetmore who first proposed the use of some method of casting lots, calling the attention of the defendants to a pair of dice he happened to have with him. The defendants were at first reluctant to adopt so desperate a procedure, but after the conversations by wireless related above, they finally agreed on the plan proposed by Whetmore. After much discussion of the mathematical problems involved, agreement was finally reached on a method of determining the issue by the use of the dice.

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Before the dice were cast, however, Whetmore declared that he withdrew from the arrangement, as he had decided on reflection to wait for another week before embracing an expedient so frightful and odious. The others charged him with a breach of faith and proceeded to cast the dice. When it came Whetmore's turn, the dice were cast for him by one of the defendants, and he was asked to declare any objections he might have to the fairness of the throw. He stated that he had no such objections. The throw went against him, and he was then put to death and eaten by his companions.

After the rescue of the defendants, and after they had completed a stay in a hospital where they underwent a course of treatment for malnutrition and shock, they were indicted for the murder of Roger Whetmore. At the trial, after the testimony had been concluded, the foreman of the jury (a lawyer by profession) inquired of the court whether the jury might not find a special verdict, leaving it to the court to say whether on the facts as found the defendents were guilty. After some discussion, both the Prosecutor and counsel for the defendants indicated their acceptance of this procedure, and it was adopted by the court. In a lengthy special verdict the jury found the facts as I have related them above, and found further that if on these facts the defendants were guilty of the crime charged against them, then they found the defendants guilty. On the basis of this verdict, the trial judge ruled that the defendants were guilty of murdering Roger Whetmore. The judge then sentenced them to be hanged, the law of our Commonwealth permitting him no discretion with respect to the penalty to be imposed. After the release of the jury, its members joined in a communication to the Chief Executive asking that the sentence be commuted to an imprisonment of six months. The trial judge addressed a similar communication to the Chief Executive. As yet no action with respect to these pleas has been taken, as the Chief Executive is apparently awaiting our disposition of this petition of error.

It seems to me that in dealing with this extraordinary case the jury and the trial judge followed a course that was not only fair and wise, but the only course that was open to them under the law. The language of our statute is well known: "Whoever shall willfully take the life of another shall be punished by death." N.C.S.A. (N.S.) § 12-A. This statute permits of no exception applicable to this case, however our sympathies may incline us to make allowance for the tragic situation in which these men found themselves.

In a case like this the principle of executive clemency seems admirably suited to mitigate the rigors of the law, and I propose to my colleagues that we follow the example of the jury and the trial judge by joining in the communications they have addressed to the Chief Executive. There is every reason to believe that these request for clemency will be heeded, coming as they do from those

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who have studied the case and had an opportunity to become thoroughly acquainted with all its circumstances. It is highly improbable that the Chief Executive would deny these requests unless he were himself to hold hearings at least as extensive as those involved in the trial below, which lasted for three months. The holding of such hearings (which would virtually amount to a retrial of the case) would scarcely be compatible with the function of the Executive as it is usually conceived. I think we may therefore assume that some form of clemency will be extended to these defendants. If this is done, then justice will be accomplished without impairing either the letter or spirit of our statutes and without offering any encouragement for the disregard of law.

FOSTER, J. I am shocked that the Chief Justice, in an effort to escape the embarrassments of this tragic case, should have adopted, should have proposed to his colleagues, an expedient at once so sordid and so obvious. I believe something more is on trial in this case than the fate of these unfortunate explorers; that is, the law of our Commonwealth. If this court declares that under our law these men have committed a crime, then our law is itself convicted in the tribunal of common sense, no matter what happens to the individuals involved in this petition of error. For us to assert that the law we uphold and expound compels us to a conclusion we are ashamed of, and from which we can only escape by appealing to a dispensation resting within the personal whim of the Executive, seems to me to amount to an admission that the law of this Commonwealth no longer pretends to incorporate justice.

For myself, I do not believe that our law compels the monstrous conclusion that these men are murderers. I believe, on the contrary, that it declares them to be innocent of any crime. I rest this conclusion on two independent grounds, either of which is of itself sufficient to justify the acquittal of these defendants.

The first of these grounds rests on a premise that may arouse opposition until it has been examined candidly. I take the view that the enacted or positive law of this Commonwealth, including all of its statutes and precedents, is inapplicable to this case, and that the case is governed instead by what ancient writers in Europe and America called "the law of nature."

This conclusion rests on the proposition that our positive law is predicated on the possibility of men's coexistence in society. When a situation arises in which the coexistence of men becomes impossible, then a condition that underlies all of our precedents and statutes has ceased to exist. When the condition disappears, then it is my opinion that the force of our positive law disappears with it. We are not accustomed to applying the maxim cessante ratione legis, cessat et ipsla lex to the whole of our enacted law, but I believe that this is a case where the maxim should be so applied.

The proposition that all positive law is based on the possibility of men's coexistence has a strange sound, not because the truth it contains is strange, but simply because it is a truth so obvious and pervasive that we seldom have occasion to give words to it. Like the air we breathe, it so pervades our environment that we forget that it exists until we are suddenly deprived of it. Whatever particular objects may be sought by the various branches of our law, it is apparent on reflection that all of them are directed toward facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in common. When the assumption that men may live together loses its truth, as it obviously did in this extraordinary situation where life only became possible by the taking of life, then the basic premises underlying our whole legal order have lost their meaning and force.

Had the tragic events of this case taken place a mile beyond the territorial limits of our Commonwealth, no one would pretend that our law was applicable to them. We recognize that jurisdiction rests on a territorial basis. The grounds of this principle are by no means obvious and are seldom examined. I take it that this principle is supported by an assumption that it is feasible to impose a single legal order upon a group of men only if they live together within the confines of a given area of the earth's surface. The premise that men shall coexist in a group underlies then, the territorial principle, as it does all of law. Now I contend that a case may be removed morally from the force of a legal order, as well as geographically. If we look to the purposes of law and government, and to the premises underlying our positive law, these men when they made their fateful decision were remote from our legal order as if they had been a thousand miles beyond our boundaries. Even in a physical sense, their underground prison was separated from our courts and writ-servers by a solid curtain of rock that could be removed only after the most extraordinary expenditure of time and effort.

I conclude, therefore, that at the time Roger Whetmore's life was ended by these defendants they were, to use the quaint language of nineteenth-century writers, not in a "state of civil society" but in a "state of nature." This has the consequence that the law applicable to them is not the enacted and established law of this Commonwealth, but the law derived from those principles that were appropriate to their condition. I have no hesitancy in saying that under those principles they were guiltless of any crime.

What these men did was done in pursuance of an agreement accepted by all of them and first proposed by Whetmore himself. Since it was apparent that their extraordinary predicament made inapplicable the usual principles that regulate men's relations with one another, it was necessary for them to draw, as it were, a new charter of government appropriate to the situation in which they found themselves.

It has from antiquity been recognized that the most basic principle of law or government is to be found in the notion of contract or agreement. Ancient thinkers, especially during the period from 1600 to 1900, used to base government itself on a supposed original social compact. Skeptics pointed out that this theory contradicted the known facts of history, and that there was no scientific evidence to support the notion that any government was ever founded in the manner supposed by the theory. Moralists replied that, if the compact was a fiction from a historical point of view, the notion of compact or agreement furnished the only ethical justification on which the powers of government, which include that of taking life, could be rested. The powers of government can only be justified morally on the ground that these are powers that reasonalbe men would agree upon and accept if they were faced with the necessity of constructing anew some order to make their life in common possible.

Fortunately, our Commonwealth is not bothered by the perplexities that beset the ancients. We know as a matter of historical truth that our government was founded upon a contract or free accord of men. The archeological proof is conclusive that in the first period following the Great Spiral the survivors of that holocaust voluntarily came together and drew up a charter of government. Sophistical writers have raised questions as to the power of those remote contractors to bind future generations, but the fact remains that our government traces itself back in an unbroken line to that original charter.

If, therefore, our hangmen have the power to end men's lives, if our sheriffs have the power to put delinquent tenants in the street, if our police have the power to incarcerate the inebriated reveler, these powers find their moral justification in that original compact of our forefathers. If we can find no higher source for our legal order, what higher source should we expect these starving unfortunates to find for the order they adopted for themselves?

I believe that the line of argument I have just expounded permits of no rational answer. I realize that it will probably be received with a certain discomfort by many who read this opinion, who will be inclined to suspect that some hidden sophistry must underlie a demonstaation that leads to so many unfamiliar conclusions. The source of this discomfort is, however, easy to identify. The usual conditions of human existence incline us to think of human life as an absolute value, not to be sacrificed under any circumstances. There is much that is fictitious about this conception even when it is applied to the ordinary relations of society. We have an illustration of this truth in the very case before us. Ten workmen were killed in the process of removing the rocks from the opening to the cave. Did not the engineers and government officials who directed the rescue effort know that the operations they were undertaking were dangerous and involved a serious risk to the lives of the workmen executing them? If it was proper that these ten lives should be sacrificed to save the lives of five imprisoned explorers, why then are we told it was wrong for these explorers to carry out an arrangement which would save four lives at the cost of one?

Every highway, every tunnel, every building we project involves a risk to human life. Taking these projects in the aggregate, we can calculate with some precision how many deaths the construction of them will require; statisticians can tell you the average cost in human lives of a thousand miles of a four-land concrete highway. Yet we deliberately and knowingly incur and pay this cost on the assumption that the values obtained for those who survive outweigh the loss. If these things can be said of a society functioning above ground in a normal ordinary manner, what shall we say of the supposed absolute value of a human life in the desperate situation in which these defendants and their companion Whetmore found themselves?

This concludes the exposition of the first ground of my decision. My second ground proceeds by rejecting hypothetically all the premises on which I have so far proceeded. I concede for purposes of argument that I am wrong in saying that the situation of these men removed them from the effect of our positive law, and I assume that the Consolidated Statutes have the power to penetrate five hundred feet of rock and to impose themselves upon these starving men huddled in their underground prison.

Now it is, of course, perfectly clear that these men did an act that violates the literal wording of the statute which declares that he who "shall willfully take the life of another" is a murderer. But one of the most ancient bits of legal wisdom is the saying that a man may break the letter of the law without breaking the law itself. Every proposition of positive law, whether contained in a statute or a judicial precedent, is to be interpreted reasonably, in the light of its evident purpose. This is a truth so elementary that it is hardly necessary to expatiate on it. Illustrations of its application are numberless and are to be found in every branch of the law. In Commonwealth v. Staymore the defendant was convicted under a statute making it a crime to leave one's car parked in certain areas for a period longer than two hours. The defendant had attempted to remove his car, but was prevented from doing so because the streets were obstructed by a political demonstration in which he took no part and which he had no reason to anticipate. His conviction was set aside by this Court, although his case fell squarely within the wording of the statute. Again, in Fehler v. Neegas there was before this Court for construction a statute in which the word "not" had plainly been transposed from its intended position in the final and most crucial section of the act. This transposition was contained in all the successive drafts of the act, where it was apparently overlooked by the draftsmen and sponsors of the legislation. No one was able to prove how the error came about, yet it was apparent that, taking account of the contents of the statute as a whole, an error had been made, since a literal reading of the final clause rendered it inconsistent with everything that had gone before and with the object of the enactment as stated in its preamble This Court refused to accept a literal interpretation of the statute, and in effect rectified its language by reading the word "not" into the place where it was evidently intended to go.

The statute before us for interpretation has never been applied literally. Centuries ago it was established that a killing in self-defense is excused. There is nothing in the wording of the statute that suggests this exception. Various attempts have been made to reconcile the legal treatment of self-defense with the words of the statute, but in my opinion these are all merely ingenious sophistries. The truth is that the exception in favor of self-defense cannot be reconciled with the words of the statute, but only with its purpose.

The true reconciliation of the excuse of self-defense with the statute making it a crime to kill another is to be found in the following line of reasoning. One of the principal objects underlying any cirminal legislation is that of deterring men from crime. Now it is apparent that if it were declared to be the law that a killing in self-defense is murder such a rule could not operate in a deterrent manner. A man whose life is threatened will repel his aggressor, whatever the law may say. Looking therefore to the broad purposes of criminal legislation, we may safely declare that this statute was not intended to apply to cases of self-defense.

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When the rationale of the excuse of self-defense is thus explained, it becomes apparent that precisely the same reasoning is applicable to the case at bar. If in the future any group of men ever find themselves in the tragic predicament of these defendants, we may be sure that their decision whether to live or die will not be controlled by the contents of our criminal code. Accordingly, if we read this statute intelligently it is apparent that it does not apply to this case. The withdrawal of this situation from the effect of the statute is justified by precisely the same considerations that were applied by our predecessors in office centuries ago to the case of self-defense.

There are those who raise the cry of judicial usurpation whenever a court, after analyzing the purpose of a statute, gives to its words a meaning that is not at once apparent to the casual reader who has not studied the statute closely or examined the objectives it seeks to attain. Let me say emphatically that I accept without reservation the proposition that this Court is bound by the statutes of our Commonwealth and that it exercises its powers in subservience to the duly expressed will of the Chamber of Representatives. The line of reasoning I have applied above raises no question of fidelity to enacted law, though it may possibly **raise** a question of the distinction between intelligent and unintelligent fidelity. No superior wants a servant who lacks the capacity to read between the lines. The stupidest housemaid knows that when she is told "to peel the soup and skim the potatoes" her mistress does not mean what she says. She also knows that when her master tells her to "drop everything and come running" he has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel. Surely we have a right to expect the same modicum of intelligence from the judiciary. The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective.

I therefore conclude that on any aspect under which this case may be viewed these defendants are innocent of the crime of murdering Roger Whetmore, and that the conviction should be set aside.

TATTING, J. In the discharge of my duties as a justice of this Court, I am usually able to dissociate the emotional and intellectual sides of my reactions, and to decide the case before me entirely on the basis of the latter In passing on this tragic case I find that my usual resources fail me. On the emotional side I find myself torn between sympathy for these men and a feeling of abhorrence and disgust at the monstrous act they committed. I had hoped that I would be able to put these contradictory emotions to one side as irrelevant, and to decide the case on the basis of a convincing and logical demonstration of the result demanded by our law. Unfortunately, this deliverance has not been vouchsafed me.

As I analyze the opinion just rendered by my brother Foster, I find that it is shot through with contradictions and fallacies. Let us begin with his first proposition: these men were not subject to our law because they were not in a "state of civil society" but in a "state of nature." I am not clear why this is so, whether it is because of the thickness of the rock that imprisoned them or because they had set up a "new charter of government" by which the usual rules of law were to be supplanted by a throw of the dice. Other difficulties intrude themselves. If these men passed from the jurisdiction of our law to that of "the law of nature," at what moment did this occur? Was it when the entrance to the cave was blocked, or when the threat of starvation reached a certain undefined degree of intensity, or when the agreement for the throwing of the dice was made? These uncertainties in the doctrine proposed by my brother are capable of producing real difficulties. Suppose, for example, one of these men had had his twenty-first birthday while he was imprisoned within the mountain. On what date would we have to condider that he had attained his majority--when he reached the age of twenty-one, at which time he was, by hypothesis, removed from the effects of our law, or only when he was released from the cave and became again subject to what my brother calls our "positive law?" These difficulties may seem fanciful, yet they only serve to reveal the fanciful nature of the doctrine that is capable of giving rise to them.

But it is not necessary to explore these niceties further to demonstrate the absurdity of my brother's position. Mr. Justice Foster and I are the appointed judges of a court of the Commonwealth of Newgarth, swarn and empowered to administer the laws of that Commonwealth. By what authority do we resolve ourselves into a Court of Nature? If these men were indeed under the law of nature, whence comes our authroity to expound and apply that law? Certainly _we_ are not in a state of nature.

Let us look at the contents of this code of nature that my brother proposes we adopt as our own and apply to this case. What a topsy-turvy and odious code it is! It is a code in which the law of contracts is more fundamental than the law of murder. It is a code under which a man may make a valid agreement empowering his fellows to eat his own body. Under the provisions of this code, furthermore, such an agreement once made is irrevocable, and if one of the parties attempts to withdraw, the others may take the law into their own hands and enforce the contract by violence--for though my brother passes over in convenient silence the effect of Whetmore's withdrawal, this is the necessary implication of his argument.

The principles my brother expounds contain other implications that cannot be tolerated. He argues that when the defendants set upon Whetmore and killed him (we know not how, perhaps by pounding him with stones) they were only exercising the rights conferred upon them by their bargain. Suppose, however, that Whetmore had had concealed upon his person a revolver, and that when he saw the defendants about to slaughter him he had shot them to death in order to save his own life. My brother's reasoning applied to these facts would make Whetmore out to be a murderer, since the excuse of self-defense would have to be denied to him. If his assailants were acting rightfully in seeking to bring about his death, then of course he could no more plead the excuse that he was defending his own life than could a condemned prisoner who struck down the executioner lawfully attempting to place the noose about his neck.

All of these considerations make it impossible for me to accept the first part of my brother's argument. I can neither accept his notion that these men were under a code of nature which this court was bound to apply to them, nor can I accept the odious and perverted rules that he would read into that code. I come now to the second part of my brother's opinion, in which he seeks to show that the defendants did not violate the provisions of N.C.S.A. (N. S.) § 12-A. Here the way, instead of being clear, becomes for me misty and ambiguous, though my brother seems unaware of the difficulties that inhere in his demonstrations.

The gist of my brother's argument may be stated in the following terms: No statute, whatever its language, should be applied in a way that contradicts its purpose. One of the purposes of any criminal statute is to deter. The application of the statute making it a crime to kill another to the peculiar facts of this case would contradict this purpose, for it is impossible to believe that the contents of the cirminal code could operate in a deterrent manner on men faced with the alternative of life or death. The reasoning by which this exception is read into the statute is, my brother observes, the same as that which is applied in order to provide the excuse of self-defense.

On the face of things this demonstration seems very convincing indeed. My brother's interpretation of the rationale of the excuse on self-defense is in fact supported by a decision of this court, Commonwealth v. Parry, a precedent I happened to encounter in my research on this case. Though Commonwealth v. Parry seems generally to have been overlooked in the texts and subsequent decisions, it supports unambiguously the interpretation my brother has put upon the excuse of self-defense.

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Now let me outline briefly, however, the preplexities that assail me when I examine my brother's demonstration more closely. It is true that a statute should be applied in the light of its purpose, and that one of the purposes of criminal legislation is recognized to be deterrence. The difficulty is that other purposes are also ascribed to the law of crimes. It has been said that one of its objects is to provide an orderly outlet for the instinctive human demand for retribution. Commonwealth v. Scape. It has also been said that its object is the rehabilitation of the wrongdoer. Commonwealth v. Makeover. Other theories have been propounded. Assuming that we must interpret a statute in the light of its purpose, what are we to do when it has many purposes or when its purposes are disputed?

A similar difficulty is presented by the fact that although there is authority for my brother's interpretation of the excuse of self-defense, there is other authority which assigns to that excuse a different rationals. Indeed, until I happened on Commonwealth v. Parry I had never heard of the explanation given by my brother. The taught doctrine of our law schools, memorized by generations of law students, runs in the following terms: The statute concerning murder requires a "willful" act. The man who acts to repel an aggressive threat to his own life does not act "willfully," but in response to an impulse deeply ingrained in human nature. I suspect that there is hardly a lawyer in this Commonwealth who is not familiar with this line of reasoning, especially since the point is a great favorite of the bar examiners.

Now the familiar explanation for the excuse of self-defense just expounded obviously cannot be applied by analogy to the facts of this case. These men acted not only "willfully" but with great deliberation and after hours of discussing what they should do. Again we encounter a forked path, with one line of reasoning leading us in one direction and another in a direction that is exactly the opposite. This perplexity is in this case compounded, as it were, for we have to set off one explanation, incorporated in a virtually unknown precedent of this Court, against another explanation, which forms a part of the taught legal tradition of our law schools, but which, so far as I know, has never been adopted in any judicial decision.

I recognize the relevance of the precedents cited by my brother concerning the displaced "not" and the defendant who parked overtime. But what are we to do with one of the landmarks of our jurisprudence, which again my brother passes over in silence? This is Commonwealth v. Valjean. Though the case is somewhat obscurely reported, it appears that the defendant was indicted for the larceny of a loaf of bread, and offered as a defense that he was in a condition approaching starvation. The court refused to accept this defense. If hunger cannot justify the theft of whole-some and natural food, how can it justify the killing and eating of a man? Again, if we look at the thing in terms of deterence, is it likely that a man will starve to death to avoid a jail sentence for the theft of a loaf of bread? My brother's demonstrations would compel us to overrule Commonwealth v. Valjean, and many other precedents that have been built on that case.

Again, I have difficulty in saying that no deterrent effect whatever could be attributed to a decision that these men were quilty of murder. The stigma of the word "murderer" is such that it is quite likely, I believe, that if these men had known that their act was deemed by the law to be murder they would have waited for a few days at least before carrying out their plan. During the time some unexpected relief might have come. I realize that this observation only reduces the distinction to a matter of degree, and does not destroy it altogether. It is certainly true that the element of deterrence would be less in this case than is normally involved in the application of the criminal law.

There is still a further difficulty in my brother Foster's proposal to read an exception into the statute to favor this case, though again a difficulty not even intimated in his opinion. What shall be the scope of this exception? Here the men cast lots and the victim was himself originally a party to the agreement. What would we have to decide if Whetmore had refused from the beginning to participate in the plan? Would a majority be permitted to overrule him? Or suppose that no plan were adopted at all and the others simply conspired to bring about Whetmore's death, justifying their act by saying that he was in the weakest condition. Or again, that a plan of selection was followed but one based on a different justification than the one adopted here, as if the others were atheists and insisted that Whetmore should die because he was the only one who believed in an afterlife. These illustrations could be multiplied, but enough have been suggested to reveal what a quagmire of hidden difficulties my brother's reasoning contains.

Of course I realize on reflection that I may be concerning myself with a problem that will never arise, since it is unlikely that any group of men will ever again be brought to commit the dread act that was involved here. Yet, on still further reflection, even if we are certain that no similar case will arise again, do not the illustrations I have given show the lack of any coherent and rational principle in the rule my brother proposes? Should not the soundness of a principle be tested by the conclusions it entails, without reference to the accidents of later litigational history? Still, if this is so, why is it that we of this Court so often discuss the question whether we are likely to have later occasion to apply a principle urged for the solution of the case before us? Is this a situation where a line of reasoning not originally proper has become sanctioned by precedent, so that we are permitted to apply it and may even under an obligation to do so?

The more I examine this case and think about it, the more deeply I become involved. My mind becomes entangled in the meshes of the very nets I throw out for my own rescue. I find that almost every consideration that bears on the decision of the case is counter balanced by an opposing consideration leading in the opposite direction. My brother Foster has not furnished to me, nor can I discover for myself, any formula capable of resolving the equivocations that beset me on all sides.

I have given this case the best thought of which I am capable. I have scarcely slept since it was argued before us. When I feel myself inclined to accept the view of my brother Foster, I am repelled by a feeling that his arguments are intellectually unsound and approach mere rationalization. On the other hand, when I incline toward upholding the conviction, I am struck by absurdity of directing that these men be put to death when their lives have been saved at the cost of the lives of ten heroic workmen. It is to me a matter of regret that the Prosecutor saw fit to ask for an indictment for murder. If we had a provision in our statutes making it a crime to eat human flesh, that would have been a more appropriate charge. If no other charge suited to the facts of this case could be brought against the defendants, it would have been wiser, I think, not to have indicted them at all. Unfortunately, however, the men have been indicted and tried, and we have therefore been drawn into this unfortunate affair.

Since I have been wholly unable to resolve the doubts that beset me about the law of this case, I am with regret announcing a step that is, I believe, unprecedented in the history of this tribunal. I declare my withdrawal from the decision of this case.

KEEN, J. I should like to begin by setting to one side two questions which are not before this Court.

The first of these is whether executive clemency should be estended to these defendants if the conviction is affirmed. Under our system of government, that is a question for the Chief Executive, not for us. I therefore disapprove of that passage in the opinion of the Chief Justice in which he in effect gives instructions to the Chief Executive as to what he should do in this case and suggests that some improperiety will attach if these instructions are not heeded. This is a confusion of governmental functions--a confusion of which the judiciary should be the last to be guilty. I wish to state that if I were the Chief Executive I would go farther in the direction of clemency than the pleas addressed to him propose. I would pardon these men altogether, since I believe that they have already suffered enough to pay for any offense they may have committed. I want it to be understood that this remark is made in my capacity as a private citizen who by the accident of his office happens to have acquired an intimate acquaintance with the facts of this case. In the discharge of my duties as judge, it is neither my function to address directions to the Chief Executive, nor to take into account what he may or may not do, in reaching my own decision, which must be controlled entirely by the law of this Commonwealth.

The second question that I wish to put to one side is that of deciding whether what these men did was "right" or "wrong," "wicked" or "good." That is also a question that is irrelevant to the discharge of my office as a judge sworn to apply, not my conceptions of morality, but the law of the land. In putting this question to one side I think I can also safely dismiss without comment the first and more poetic portion of my brother Foster's opinion. The element of fantasy contained in the arguments developed there has been sufficiently revealed in my brother Tatting's somewhat solemn attempt to take those arguments seriously.

The sole question before us for decision is whether these defendants did, within the meaning of N.C.S.A. (N.S.) § 12-A, willfully take the life of Roger Whetmore. The exact language of the statute is as follows: "Whoever shall willfully take the life of another shall be punished by death." Now I should suppose that any candid observer, content to extract from these words their natural meaning, would concede at once that these defendants did "willfully take the life" of Roger Whetmore.

Whence arise all the difficulties of the case, then, and the necessity for so many pages of discussion about what ought to do so obvious? The difficulties, in whatever tortured form they may present themselves, all trace back to a single source, and that is a failure to distinguish the legal from the moral aspects of this case. To put it bluntly, my brothers do not like the fact that the written law requires the conviction of these defendants. Neither do I, but unlike my brothers I respect the obligations of an office that requires me to put my personal predilections out of my mind when I come to interpret and apply the law of this Commonwealth.

Now, of course, my brother Foster does not admit that he is actuated by a personal dislike of the written law. Instead, he develops a familiar line of argument to which the court may disregard the express language of a statute when something not contained in the statute itself, called its "purpose," can be employed to justify the result the court considers proper. Because this is an old issue between myself and my colleague, I should like, before discussing his particular application of the argument to the facts of this case, to say something about the historical background of this issue and its implications for law and government generally.

There was a time in this Commonwealth when judges did in fact legislate very freely, and all of us know that during that period some of our statutes were rather thoroughly made over by the judiciary. That was a time when the accepted principles of political science did not designate with any certainty the rank and function of the various arms of the state. We all know the tragic issue of that uncertainility in the brief civil war that arose out of the conflict between the judiciary, on the one hand, and the executive and the legislature, on the other. There is no need to recount here the factors that contributed to that unseemly struggle for power, though they included the unrepresentative character of the Chamber, resulting from a division of the country into election districts that no longer accorded with the actual distribution of the population, and the forceful personality and wide popular following of the then Chief Justice. It is enough to observe that those days are behind us, and that in place of the uncertainty that then reigned we now have a clear-cut principle, which is the supremacy of the legislative branch of our government. From that principle flows the obligation of the judiciary to enforce faithfully the written law, and to interpret that law in accordance with its plain meaning without reference to our personal desires or our individual conceptions of justice. I am not concerned with the question whether the principle that forbids the judicial revision of statutes is right or wrong, desirable or undesirable; I observe merely that this principle has become a tacit premise underlying the whole of the legal and governmental order I am sworn to administer.

Yet though the principle of the supremacy of the legislature has been accepted in theory for centuries, such is the tenacity of professional tradition and the force of fixed habits of thought that many of the judiciary have still not accommodated themselves to the restricted role which the new order imposes on them. My brother Foster is one of that group; his way of dealing with statutes is exactly that of a judge living in the 3900's.

We are all familiar with the process by which the judicial reform of disfavored legislative enactments is accomplished. Anyone who has followed the written opinions of Mr. Justice Foster will have had an opportunity to see it at work in every branch of the law. I am personally so familiar with the process that in the event of my brother's incapacity I am sure I would write a satisfactory opinion for him without any prompting whatever, beyond being informed whether he liked the effect of the terms of the statute

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as applied to the case before him.

The process of judicial reform requires three steps. The first of these is to divise some single "purpose" which the statute serves. This is done although not one statute in a hundred has any such single purpose, and although the objectives of nearly every statute are differently interpreted by the different classes of its sponsors. The second step is to discover that a mythical being called "the legislator," in the pursuit of this imagined "purpose," overlooked something or left some gap or imperfection in his work. Then comes the final and most refreshing part of the task, which is, of course to fill in the blank thus created. *Quod erat faciendum*.

My brother Foster's penchant for finding holes in statutes reminds one of the story told by an ancient author about the man who ate a pair of shoes. Asked how he liked them, he replied that the part he liked best was the holes. That is the way my brother feels about statutes; the more holes they have in them the better he likes them. In short, he doesn't like statutes.

One could not wish for a better case to illustrate the specious nature of this gap-filling process than the one before us. My brother thinks he knows exactly what was sought when men made murder a crime, and that was something he calls "deterrence." My brother Tatting has already shown how much is passed over in that interpretation. But I think the trouble goes deeper. I doubt very much whether our statute making murder a crime really has a "purpose" in any ordinary sense of the term. Primarily, such a statute reflects a deeply felt human conviction that murder is wrong and that something should be done to the man who commits it. If we were forced to be more sophisticated theories of the criminologists, which, of course, were certainly not in the minds of those who drafted our statute. We might also observe that men will do their own work more effectively and live happier lives if they were protected against the threat of violent assault. Bearing in mind that the victims of murders are often unpleasant people, we might add some suggestion that the matter of disposing of undesirables is not a function suited to private enterprise, but should be a state monopoly. All of which reminds me of the attorney who once argued before us that a statute licensing physicians was a good thing because it would lead to lower life insurance rates by lifting the level of general health. There is such a thing as overexplaining the obvious.

If we do not know the purpose of § 12-A, how can we know what its draftsmen thought about the question of killing men in order to eat them? My brother Tatting has revealed an understandable, though perhaps slightly exaggerated revulsion to cannibalism. How do we know that his remote ancestors did not feel the same revulsion to an even higher degree? Anthropoligists say that the dread felt for a forbidden act may be increased by the fact that the conditions of a tribe's life create special temptations toward it, as incest is most severly condemned among those whose village relations make it most likely to occur. Certainly the period following the Great Spiral was one that had implicit in it temptations to anthropophage Perhaps it was for that very reason that our ancestors expressed their prohibition in so broad and unqualified a form. All of this is conjecture, of course, but it remains abundantly clear that neither I nor my brother Foster knows what the "purpose" of § 12-A is.

Considerations similar to those I have just outlined are also applicable to the exception in favor of self-defense, which plays so large a role in the reasoning of my brothers Foster and Tatting. It is of course true that in Commonwealth v. Parry an obiter dictum justified this exception on the assumption that the purpose of criminal legislation is to deter. It may well also be true that generations of law students have been taught that the true explanation of the exception lies in the fact that a man who acts in self-defense does not act "willfully," and that the same students have passed their bar examinations by repeating what their professors told them. These last observations I could dismiss, of course, as irrelevant for the simple reason that professors and bar examiners have not as yet any commission to make our laws for us. But again the real trouble lies deeper. As in dealing with the statute, so in dealing with the exception, the question is not the conjectural purpose of the rule, but its scope. Now the scope of the exception in favor of self-defense as it has been applied by this Court is plain: it applies to cases of resisting an aggressive threat to the party's own life. It is therefore too clear for argument that this case does not fall within the scope of the exception, since it is plain that Whetmore made no threat against the lives of these defendants.

The essential shabbiness of my brother Foster's attempt to cloak his remaking of the written law with an air of legitimacy comes tragically to the surface in my brother Tatting's opinion. In that opinion Justice Tatting struggles manfully to combine his colleague's loose moralisms with his own sense of fidelity to the written law. The issue of this struggle could only be that which occurred, a complete default in the discharge of the judicial function. You simply cannot apply a statute as it is written and remake it to meet your own wishes at the same time.

Now I know that the line of reasoning I have developed in this opinion will not be acceptable to those who look only to the immediate effects of a decision and ignore the long-run implications of an assumption by the judiciary of a power of dispensation. A hard decision is never a popular decision. Judges have been celebrated in literature for their sly prowess in devising some quibble by which a litigant could be deprived of his rights where the public thought it was wrong for him to assert those rights. But I believe that judicial despensation does more harm in the long run than hard decisions. Hard cases may even have a certain moral value by bringing home to the people their own responsibilities toward the law that is ultimately their creation, and by reminding them that there is no principle of personal grace that can relieve the mistakes of their representatives.

Indeed, I will go farther and say that not only are the principles I have been expounding those which are soundest for our present conditions, but that we would have inherited a better legal system from our forefathers if those principles had been observed from the beginning. For example, with respect to the excuse of self-defense, if our courts had stood steadfast on the language of the statute the result would undoubtedly have been a legislative revision of it. Such a revision would have drawn on the assistance of natural philosophers and psychologists, and the resulting regulation of the matter would have had an understandable and rational basis, instead of the hodgepodge of verbalisms and metaphysical distinctions that have emerged from the judicial and professorial treatment.

These concluding remarks are, of course, beyond any duties that I have to discharge with relation to this case, but I include them here because I feel deeply that my colleagues are insufficiently aware of the dangers implicit in the conceptions of the judicial office advocated by my brother Foster.

I conclude that the conviction should be affirmed.

Handy, J. I have listened with amazement to the tortured ratiocinations to which this simple case has given rise. I never cease to wonder at my colleagues' ability to throw an obscuring curtain of legalisms about every issue presented to them for decision. We have heard this afternoon learned disquisitions on the distinction between positive law and the law of nature, the language of the statute and the purpose of the statute, judicial functions and executive functions, judicial legislation and legislative legislation. My only disappointment was that someone did not raise the question of the legal nature of the bargain struck in the cave - whether it was unilateral or bilateral, and whether Whetmore could not be considered as having revoked an offer prior to action taken thereunder.

What have all these things to do with the case? The problem before us is what we, as officers of the government, ought to do with these defendants. That is a question of practical

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wisdom, to be exercised in a context, not of abstract theory, but of human realities. When the case is approached in this light, it becomes, I think, one of the easiest to decide that has ever been argued before this Court.

Before stating my own conclusions about the merits of the case, I should like to discuss briefly some of the more fundamental issues involved - issues on which my colleagues and I have been divided ever since I have been on the bench.

I have never been able to make my brothers see that government is a human affair, and that men are ruled, not by words on paper or by abstract theories, but by other men. They are ruled well when their rulers understand the feelings and conceptions of the masses. They are ruled badly when that understanding is lacking.

Of all branches of the government, the judiciary is the most likely to lose its contact with the common man. The reasons for this are, of course, fairly obvious. Where the masses react to a situation in terms of a few salient features, we pick into little pieces every situation presented to us. Lawyers are hired by both sides to analyze and dissect. Judges and attorneys vie with one another to see who can discover the greatest number of difficulties and distinctions in a single set of facts. Each side tries to find cases, real or imagined, that will embarrass the demonstrations of the other side. To escape this embarrassment, still further distinctions are invented and imported into the situation. When a set of facts has been subjected to this kind of treatment for a sufficient time, all the life and juice have gone out of it and we have left a handful of dust.

Now I realize that wherever you have rules and abstract principles lawyers are going to be able to make distinctions. To some extent the sort of thing I have been describing is a necessary evil attaching to any formal regulation of human affairs. But I think that the area which really stands in need of such regulation is greatly overestimated. There are, of course, a few fundamental rules of the game that must be accepted if the game is to go on at all. I would include among these the rules relating to the conduct of elections, the appointment of public officials, and the term during which an office is held. Here some restraint on discretion and dispensation, some adherence to form, some scruple for what does and what does not fall within the rule, is, I concede, essential. Perhaps the area of basic principle should be expanded to include certain other rules, such as those designed to preserve the free civilmiogn system.

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But outside of these fields I believe that all government officials, including judges, will do their jobs best if they treat forms and abstract concepts as instruments. We should take as our model, I think, the good administrator, who accommodates procedures and principles to the case at hand, selecting from among the available forms those most suited to reach the proper result.

The most obvious advantage of this method of government is that it permits us to go about our daily tasks with efficiency and common sense. My adherence to this philosophy has, however, deeper roots. I believe that it is only with the insight this philosophy gives that we can preserve the flexibility essential if we are to keep our actions in reasonable accord with the sentiments of those subject to our rule. More governments have been wrecked, and more human misery caused, by the lack of this accord between ruler and ruled than by any other factor that can be discerned in history. Once drive a sufficient wedge between the mass of people and those who direct their legal, political, and economic life, and our society is ruined. Then neither Foster's law of nature nor Keen's fidelity to written law will avail us anything.

Now when these conceptions are applied to the case before us, its decision becomes, as I have said, perfectly easy. In order to demonstrate this I shall have to introduce certain realities that my brothers in their coy decorum have seen fit to pass over in silence, although they are just as acutely aware of them as I am.

The first of these is that this case has aroused an enormous public interest, both here and abroad. Almost every newspaper and magazine has carried articles about it; columnists have shared with their readers confidential information as to the next governmental move; hundreds of letters-to-the-editor have been printed. One of the great newspaper chains made a poll of public opinion on the question, "What do you think the Supreme Court should do to the Speluncean explorers?" About ninety per cent expressed a belief that the defendants should be pardoned or lett off with a kind of token punishment. It is perfectly clear, then how the public feels about the case. We could have known this without the poll, of course, on the basis of common sense, or even by observing that on this Court there are apparently four-and-a-half men, or ninety per cent, who share the common opinion.

This makes it obvious, not only what we should do, but what we must do if we are to preserve between ourselves and public opinion a reasonable and decent accord. Declaring these men innocent need not involve us in any undignified quibble or trick. No principle of statutory construction is required that is not consistent with

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the past practices of this Court. Certainly no layman would think that in letting these men off we had stretched the statute any more than our ancestors did when they created the excuse of self-defense. If a more detailed demonstration of the method of reconciling our decision with the statute is required, I should be content to rest on the arguments developed in the second and less visionary part of my brother Foster's opinion.

Now I know that my brothers will be horrified by my suggestion that this Court should take account of public opinion. They will tell you that public opinion is emotional and capricious, that it is based on half-truths and listens to witnesses who are not subject to cross-examination. They will tell you that the law surrounds the trial of a case like this with elaborate safeguards, designed to insure that the truth will be known and that every rational consideration bearing on the issues of the case has been taken into account. They will warn you that all of these safeguards go for naught if a mass opinion formed outside this framework is allowed to have any influence on our decision.

But let us look candidly at some of the realities of the administration of our criminal law. When a man is accused of crime, there are, speaking generally, four ways in which he may escape punishment. One of these is a determination by a judge that under the applicable law he has committed no crime. This is, of course, a determination that takes place in a rather formal and abstract atmosphere. But look at the other three ways in which he may escape punishment. There are: (1) a decision by the Prosecutor not to ask for an indictment; (2) an acquittal by the jury; (3) a pardon or commutation of sentence by the executive. Can anyone pretend that these decisions are held within a rigid and formal framework of rules that prevents factual error, excludes emotional and personal factors, and guarantees that all the forms of the law will be observed?

In the case of the jury we do, to be sure, attempt to cabin their deliberations within the area of the legally relevant, but there is no need to deceive ourselves into believing that this attempt is really successful. In the normal course of events the case now before us would have gone on all of its issues directly to the jury. Had this occurred we can be confident that there would have been an acquittal or at least a division that would have prevented a conviction. If the jury had been instructed that the men's hunger and their agreement were no defense to the charge of murder, their verdict would in all likelihood have ignored this instruction and would have involved a good deal more twisting of the letter of the law than any that is likely to tempt us. Of course the only reason that didn't occur in this case was the fortuitous circumstance that the foreman of the jury happened to be a lawyer. His learning enabled him to devise

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a form of words that would allow the jury to dodge its usual responsibilities.

My brother Tatting expresses annoyance that the Prosecutor did not, in effect, decide the case for him by asking for an indictment. Strict as he is himself in complying with the demands of legal theory, he is quite content to have the fate of these men decided out of court by the Prosecutor on the basis of common sense. The Chief Justice, on the other hand, wants the application of common sense postponed to the very end, though like Tatting, he wants no personal part in it.

This brings me to the concluding portion of my remarks, which has to do with executive clemency. Before discussing that topic directly, I want to make a related observation about the poll of public opinion. As I have said, ninety per cent of the people wanted the Supreme Court to let the men off entirely or with a more or less nominal punishment. The ten per cent constituted a very oddly assorted group, with the most curious and divergent opinions. One of our university experts has made a study of this group and has found that its members fall into certain patterns. A substantial portion of them are subscribers to "crank" newspapers of limited circulation that gave their readers a distorted version of the facts of the case. Some thought that "Speluncean" means "cannibal" and that anthropophagy is a tenet of the Society. But the point I want to make, however, is this: although almost every conceivable variety and shade of opinion was represented in this group, there was, so far as I know, not one of them, nor a single member of the majority of ninety per cent, who said "I think it would be a fine thing to have the courts sentence these men to be hanged, and then to have another branch of the government come along and pardon them." Yet this is a solution that has more or less dominated our discussions and which our Chief Justice proposes as a way by which we can avoid doing an injustice and at the same time preserve respect for law. He can be assured that if he is preserving anybody's morale, it is his own, and not the public's, which knows nothing of his distinctions. I mention this matter because I wish to emphasize once more the danger that we may get lost in the patterns of our own thought and forget that these patterns often cast not the slightest shadow on the outside world.

I come now to the most crucial fact in this case, a fact known to all of us on this Court, though one that my brothers have seen fit to keep under the cover of their judicial robes. This is the frightening likelihood that if the issue is left to him, the Chief Executive will refuse to pardon these men or commute their sentence. As we all know, our Chief Executive is a man now well advanced in years, of very stiff notions. Public clamor usually operates on him with the reverse of the effect intended.

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As I have told my brothers, it happens that my wife's neice is an intimate friend of his secretary. I have learned in this indirect, but, I think, wholly reliable way, that he is firmly determined not to commute the sentence if these men are found to have violated the law.

No one regrets more than I the necessity for relying in so important a matter on information that could be characterized as gossip. If I had my way this would not happen, for I would adopt the sensible course of sitting down with the Executive, going over the case with him, finding out what his views are and perhaps working out with him a common program for handling the situation. But of course my brothers would never hear of such a thing.

Their scruple about acquiring accurate information directly does not prevent them from being very perturbed about what they have learned indirectly. Their acquaintance with the facts I have just related explains why the Chief Justice, ordinarily a model of decorum, saw fit in his opinion to flap his judicial robes in the face of the Executive and threaten him with excommunication if he failed to commute the sentence. It explains, I suspect, my brother Foster's feat of levitation by which a whole library of law books was lifted from the shoulders of these defendants. It explains also why even my legalistic brother Keen emulated Pooh-Bah in the ancient comedy by stepping to the other side of the stage to address a few remarks to the Executive "in my capacity as a private citizen." (I may remark, incidentally, that the advice of Private Citizen Keen will appear in the reports of this court printed at taxpayers' expense.)

I must confess that as I grow older I become more and more perplexed at men's refusal to apply their common sense to problems of law and government, and this truly tragic case has deepened my sense of discouragement and dismay. I only wish that I could convince my brothers of the wisdom of the principles I have applied to the judicial office since I first assumed it. As a matter of fact, by a kind of sad rounding of the circle, I encountered issues like those involved here in the very first case I tried as Judge of the Court of General Instances in Fanleigh County

A religious sect had unfrocked a minister who, they said, had gone over to the views and practices of a rival sect. The minister circulated a handbill making charges against the authorities who had expelled him. Certain lay members of the church announced a public meeting at which they proposed to explain the position of the church. The minister attended this meeting. Some said he slipped in unobserved in a disguise; his own testimony was that he had walked in openly as a member of the public. At any rate, when the speeches began he interrupted with certain questions about the affairs of the church and made some statements in defense of his own views. He was set upon by members of the audience and given a pretty thorough pommeling, receiving among other injuries a broken jaw. He brought a suit for damages against the association that sponsored the meeting and against ten named individuals who he alleged were his assailants.

When we came to trial, the case at first seemed very complicated to me. The attorneys raised a host of legal issues. There were nice questions on the admissibility of evidence, and, in connection with the suit against the association, some difficult problems turning on the question whether the minister was a trespasser or a licensee. As a novice on the bench I was eager to apply my law school learning and I began studying these questions closely, reading all the authorities and preparing well-documented rulings. As I studied the case I became more and more involved in its legal intricacies and I began to get into a state approaching that of my brother Tatting in this case. Suddenly, however, it dawned on me that all these perplexing issues really had nothing to do with the case, and I began examining it in the light of common sense. The case at once gained a new perspective, and I saw that the only thing for me to do was to direct a verdict for the defendants for lack of evidence.

I was led to this conclusion by the following considerations. The melee in which the plaintiff was injured had been a very confused affair, with some people trying to get to the center of the disturbance, while others were trying to get away from it; some striking at the plaintiff, while others were apparently trying to protect him. It would have taken weeks to find out the truth of the matter. I decided that nobody's broken jaw was worth that much of the Commonwealth. (The minister's injuries, incidentally, had meanwhile healed without disfigurement and without any impairment of normal faculties.) Furthermore, I felt very strongly that the plaintiff had to a large extent brought the thing on himself. He knew how inflamed passions were about the affair, and could easily have found another forum for the expression of his views. My decision was widely approved by the press and public opinion, neither of which could tolerate the views and practices that the expelled minister was attempting to defend.

Now, thirty years later, thanks to an ambitious Prosecutor and a legalistic jury foreman, I am faced with a case that raises issues which are at bottom much like those involved in that case. The world does not seem to change much, except that this time it is not a question of a judgment for five or six hundred frelars, but of the life or death of four men who have already suffered more torment and humiliation than most of us would endure in a thousand years. I conclude that the defendants are innocent of

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the crime charged, and that the conviction and sentence should be set aside.

Tatting, J. I have been asked by the Chief Justice whether, after listening to the two opinions just rendered, I desire to re-examine the position previously taken by me. I wish to state that after hearing these opinions I am greatly strengthened in my conviction that I ought not to participate in the decision of this case.

The Supreme Court being evenly divided, the conviction and sentence of the Court of General Instances is affirmed. It is ordered that the execution of the sentence shall occur at 6 a.m., Friday, April 2, 4300, at which time the Public Executioner is directed to proceed with all convenient dispatch to hang each of the defendants by the neck until he is dead.

POSTSCRIPT

Now that the court has spoken its judgment, the reader puzzled by the choice of date may wish to be reminded that the centuries which separate us from the year 4300 are roughly equal to those that have passed since the Age of Pericles. There is probably no need to observe that the Speluncean Case itself is intended neither as a work of satire nor as a prediction in any ordinary sense of the term. As for the judges who make up Chief Justice Truepenny's court, they are, of course, as mythical as the facts and precedents with which they deal. The reader who refuses to accept this view, and who seeks to trace out contemporary resemblances where none is intended or contemplated, should be warned that he is engaged in a frolic of his own, which may possibly lead him to miss whatever modest truths are contained in the opinions delivered by the Supreme Court of Newgarth. The case was constructed for the sole purpose of bringing into a common focus certain divergent philosophies of law and government. These philosophies presented men with live questions of choice in the days of Plato and Aristotle. Perhaps they will continue to do so when our era has had its say about them. If there is any element of prediction in the case, it does not go beyond a suggestion that the questions involved are among the permanent problems of the human race.

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A law which has not yet been passed is referred to as a bill. Once a bill has been introduced, it generally goes to a committee dealing with the general subject matter to which it pertains. Since all legislators are presumed to be too busy to be able to examine in depth all of the many bills introduced in any legislature, the committees are expected to perform the detailed examination of the bill, the needs of it and the possible ramifications of its passage.

The committee invites those favoring the bill and those opposing it to testify. They also frequently question experts in the particular field about their opinions. The public is often invited to testify as well. During this period special interest groups frequently supply the individual legislators with materials which they feel will persuade the legislators of the validity of their opinions on the matter. Following this examination, the committee votes on whether to recommend passage of the bill or not. They then send the bill back to the whole legislative body with the recommendation. The bill is then debated on the floor of the body and either passes or fails.* It it passes, with the appropriate signatures of the executive, it becomes a legally enforceable statute. All statutes, however, are subject to the final scrutiny of the courts in one of two ways.

Statutes are sometimes questioned by private citizens as to their constitutionality. That is whether or not the statute complies with the basic rules for laws set up in the U.S. or state statute and determines whether the particular statute is in compliance or at odds with the relevant constitution. It is important to note that the court does not itself take the iniative in this matter but must wait for an actual controversy to be brought before it.

The courts have a second vital role in the interpretation of the meaning of statutes.. In order to be useful, statutes are drafted in careful language which is supposed to state clearly the intent of the legislation and the necessary modes of enforcement. However, legislative language is usually difficult for the courts and seems frequently obscure to the lay reader. Questions about the meaning of statutes are brought to the courts by parties who are affected by the law and the interpretation of it. The court's role in deciding exactly what a statute means in a particular case or a group of cases is part of the judicial process which profoundly affects the practical effect of the legislative process.

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*This debate in the U.S. Congress and in some states is recorded and as legal history may be used by the courts to help in statutory interpretation.

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In its traditions, at least, ours is a common law system, and the most influential of our juristic writers have been great common lawyers. The emphasis of American jurisprudence upon the common law judicial process has been so marked as to convey the impression that in our legal order by far the most significant operation of judicial thinking is the decision of cases according to the principles and concepts of the common law. Legal scholars, writing from points of view as varied as those of Holmes, Cardozo, Llewellyn, and Frank, have subjected the common law judicial process to searching analysis and have shown the dimensions of the gulf between actual, necessary judicial practice and the orthodox theory that judicial thinking is but the discovery and application of pre-existing law.

By way of contrast, the judicial process in the application of the statute law to particular controversies presented to the courts for decision has received, at least until recently, hardly more than passing attention. This emphasis upon the judicial process in common law cases may have been proper during periods of legal evolution in which judgemade rules were the dominant source of law, and legislative intervention was no more than occasional piecemeal supplementation of the general body of common law. Such a focus, however, cannot reasonably be continued in the face of the increasing resort to legislation for the origination of policies and concepts adequate to provide a fair solution to modern problems...

Comparative statistics are unavailable, but a glance through the case reports will suggest that judges are called upon to consider the application of statutory directions to the cases which come before them at least as often as they are required to fashion a controlling rule from the precedents which are the sources of the common law. Already the development has gone so far that it has been said of American and of English courts that they tend more and more to approximate "the civil law ideal of courts as agencies for the application and administration of the legislative precept."

It is evident that this increasing reliance upon legislation must be given its full weight in a jurisprudence originally formulated with particular reference to the common law judicial process. One may question, for example, the adequacy of a case method of legal instruction which has, as its apparent major objective, the training of prospective lawyers in the shaping and manipulation of case-law precedents. Most significantly, the evolution of the statute law to a position, at least, of parity with the judgemade law demands the re-examination of judicial methods developed during periods in which the chief concern of the judges was to build up an interpretative technique by which occasional, ad hoc legislative directions might be fitted, neatly

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and without disturbance, into the general fabric of common law. The general judicial attitude at the time of the original pronouncment of the traditional rules of statutory interpretation is indicated by the charge of a great common lawyer, the late Sir Frederick Pollock, that many of those rules-of-thumb known as canons of construction"...cannot well be accounted for except upon the theory that Parliament generally changes the law for the worse, and that the business of the judge is to keep the mischief of its interference within the narrowest possible bounds."

Probably the most significant evidence of judicial recognition of the real place of legislation in modern American law is found in those judicial opinions which reveal the striving of judges to develop an interpretative technique keyed to the essential characteristics of the modern law-making process. Analysis of the decisions discloses that the federal courts, and to a less degree the state courts, are coming increasingly to determine the application of statutes by reference to their legislative history and to their underlying objectives, rather than by the mechanical, and hence more convenient, employment of the traditional canons or rules of construction. It is, of course, true that even in the decision of the Supreme Court, which has been the leader in the use of legislative sources, there is considerable inconsistency in the use which is made of "extrinsic aids" in different cases. Such questions as the degree to which the records of committee hearings are admissible as aids in interpretation doctrines as the "plain meaning rule" and the rule of strict construction of penal statutes is far from clear. It is quite understandable, in the light of such doubts as to basic interpretative techniques, that it is often as difficult to predict the interpretation which a court may ultimately assign to a statute as it is to predict the decision of a case in which the relevant sources are located wholly in the common law.

It must be admitted, however, that one who essays an analysis of the judicial process in the application of statute law finds more conflict in legal literature than inconsistency in the judicial decisions. The underlying conception in our theory of statutory interpretation, that of a communicable "legislative intention." has been denounced as a fraud by Radin, defended forcefully by Landis, and subjected to analytical attrition by de Sloovere. Professor Horack, by way of compromise, suggests that there is no such thing as a real "legislative intention" but that it is useful in cases of statutory interpretation to act as if there were. In this essay, it seems the part of prudence to postpone our discussion of the reality of "legislative intention" and to suggest first an analysis of the problems which judges encounter in the use of statutory directions as premises for reasoning in the decision of particular controversies, that is, of the interpretative doubts which courts customarily decide by reference to "legislative intention."

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Logical Certainty and the Statute Law

In his land-mark essay, "The Path of the Law," published before the turn of the century, Justice Holmes called attention to the fallacy of "the notion that the only force at work in the development of the law is logic." Typically, judicial opinions have been cast approximately in the form of syllogistic demonstrations, as if to suggest that the conclusion to which the judges have come, in each instance, has involved little more than the discovery of a general proposition of law embodied somewhere in the preexisting doctrine, and the deduction from it of a rule of decision for the particular case. In judicial opinions, as in other forms of argument, the syllogistic form tends to obscure the actual mental operations performed in the making of decisions. It has been the chief thesis of modern critical jurisprudence that judicial thinking is more than mere discivery and deduction, that the judge, upon occasion, is more a legislator than a syllogistic calculator. In a sense, this essay is an effort to apply that jurisprudential thesis specifically to an analysis of the judicial process in statutory interpretation.

At the outset, it would appear that the application of the statute law to particular situations of fact should be vastly more certain and predictable than the application of the case law. The judge who makes use of a statute needs not labor to develop a general principle of law by painstaking induction from ambiguous and perhaps conflicting particular precedents. The statute, itself, is in the form of a general proposition, and all that the judge would seem to have to do is to derive, by deduction from that general proposition of law, a particular rule which will control the decision of the given controversy. The tone of assurance in which many opinions involving the statute law are written appears to give support to a theory that the application of statutes involves only simple deductive operations from which the personal judgment of the members of the court can be excluded.

Experience has shown, however, that judicial decisions involving the interpretation of statutes are by no means as certain and predictable as they would be if the judicial process in this aspect were nothing more than simple deduction. There are innumerable instances of differences of opinion which have existed between trial and appellate courts, and among the several members of appellate courts, with respect to the effect of statutes in particular cases. A large proportion of the important statutory cases decided by the Supreme Court have been handed down by divided benches. Indeed, not even the authors of legislative proposals are always able to predict the conclusions which the courts will reach in the application of the statute law. A famous instance is Caminetti v. United States, in which a majority of the Supreme Court arrived at an interpretation of the Mann Act which was in direct conflict with an explicit assurance made by its author to the members of the House of Representatives.

It could hardly be asserted that such persistent diviations from the norm of predictability are due either to stubborn disregard by the judges of the directions of statutes or to the inability of judges to reckon simple logic sums. There are inherent difficulties in the process which make impossible of attainment such dreams as Bentham's hope of securing perfect legal certainty through universal codification. Inasmuch as judicial opinions, characteristically, are written in logical form, it seems advisable to formulate this analysis of the most frequently encountered problems of interpretation in terms borrowed from the discipline of logic. The suggestion is not that judges, unlike other men, are perfectly logical beings. The point is rather that in their reflective thinking judges, like other men, must make use of propositions, in this case those embodied in statutory enactments. The problems of statutory interpretation, considered from this point of approach, are problems inherent in any attempt to apply general or universal propositions to the concrete facts of actual experience.

When a judge is called upon to determine the effect which a statute shall have in a case presented to him for decision, the mental operation which he performs is, essentially, the extraction of a particular rule of decision from a general proposition of law embodied in the statute. If a concrete case is to be decided by reference to the statute law, the following essentials, at least, must be met: (1) the language of the statute must be reduced to the form of a general proposition of law; (2) the terms of the statutory proposition must be defined, that is, their meaning determined; and (3) if there be conflicting general rules or propositions in the body of statute law, a choice of one of them as the governing proposition must be made by the deciding court. These three essentials suggest three major classes of interpretative problems which arise in the judicial application of statute law.

In certain cases, the difficulty which the judge encounters is that of deriving from the language of a badly worded statute a single, intelligible general proposition of law. Occasionally a statute is so confused in its grammatical construction that the court can only determine with difficulty, if at all, just what the general idea was which the draftsmen of the enactment were attempting to convey. Ad hoc amendment of a statute during the course of its passage through the two houses is often a contributing factor to statutory confusion and internal conflict. Lawyers and judges who have had experience with statutes of this character are likely to attribute most of the uncertainty which exists in the application of legislation to the bad quality of average legislative draftsmanship. Interpretative problems of this class are of such comparatively infrequent occurrence, however, that such a generalization cannot be supported. Further examination makes it clear that there are uncertainties in the application of statutes which cannot be avoided, even by full utilization of the best drafting methods.

The problem of interpretation which judges most often face is that of determining the meaning, that is the denotation or connotation of some general term used in a statute. It is frequently open to serious question whether a particular object, event, or other fact-circumstance, involved in a given case, may properly be classified within the general term or concept which the statutory draftsman has employed. To suppose a case which will be used for illustrative purposes through this discussion, the facts of a controversy may raise the question of the applicability of a "motor vehicle" licensign law to aeroplanes. An appellate decision sustaining the applicability of the statute could conceivably be written in the form of a rough syllogism:

> Every "motor vehicle" must be licensed.
> An aeroplane is a motor vehicle.
> An aeroplane must be licensed.

It is evident, however, that a judicial opinion written in the form above would state merely the ultimate result of judicial thinking and nothing of the actual process by which that result was reached. The first and third propositions of the syllogistic statement above--that is, the statutory general principle and the particular rule deemed to control the decision of the case--may be regarded as logically connected by the syllogism only if the middle term, "motor vehicle" is common to the major and minor premise. Thus, the real issue in the case, the essential problem of interpretation, is whether aeroplanes may properly be classified as "motor vehicles" within the meaning of that term as used in the statute.

It should be observed that a statutory definition, however, carefully drawn, cannot be an exhaustive catalogue of all of the possible attributes of the general term or class referred to in the statute; all that the legislative draftsman can do is to include in the definition the common attributes of the particular objects of which he has thought. Thus, in McBoyle v. United States, which involved an interpretative issue much like the one under immediate consideration here, the statute included the following definition:

> "The term 'motor vehicle' shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails."

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What would be the helpfulness of this definition in the supposed case involving the applicability of a "motor vehicle" licensing law to aeroplanes.

In the first place, it is clear that aeroplanes posses both of the attributes mentioned in the statutory definition of the general term "motor vehicle," that is, aeroplanes are "self-propelled" and "not designed for running on rails." If the attributes mentioned in the definition be considered the sole essential attributes of the class, "motor vehicles" it follows that aeroplanes fall within the class and within the scope of the statute. But a further attribute, that of "running on the ground," is possessed in common by the particular vehicles which seem to have been in the mind of the draftsman at the time the general term was employed. The court, in our supposed case, faces the interpretative problem of determining whether an attribute possessed in common by the particular referents suggested to the members of the legislature by the general term "motor vehicle" should be regarded as an essential attribute of the class designated by the term, although the draftsman had not, by including it within the definition, expressly made it so. A comparable problem may be presented whenever a particular case involves the applicability of a statute to a fact-situation which the legislative draftsman has not foreseen and made express provision for...

Inasmuch as statutes, if they are to be general in their operation, must contain general or class terms, it is evident that interpretative doubts of this second type are inevitable in the decision of particular cases by reference to the statute law.

Thus far, two classes of cases have been considered: those in which the problem before the court is that of reducing confused statutory language to an intelligible general proposition of law, and those in which the judicial problem involves the definition, that is the determination of the meaning, of the terms of the statutory proposition. It may be that this division of the cases provides some explanation of the otherwise unrealistic distinction which writers on statutory interpretation have drawn between "interpretation" of a statute and its "application" to the facts of a given case.

The cases present a third type of interpretative problem, which is comparable to that created in common law judicial decision by the existence of conflicting precedents. Statute law is constantly undergoing revision, often without adequate legislative examination of the existing statute law, and inconsistent statutory directions may raise difficult problems of construction. Frequently even though the interpreting judge has determined that a particular situation of fact is within the terms of one statutory proposition, it is found that the situation is also within

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the general terms of another statute existing in the body of the law. The countless cases in which there have been expounded the rules of judicial policy with respect to repeals by implication illustrate the interpretative difficulties of this character and the common law judicial approach to their solution.

Interpretation as the Discovery of Legislative Meaning

In our legal and political theory it is a fundamental though inexact, generalization that the originative function of lawmaking is the province of the legislative department and that the judicial function is but the application of pre-existing law to particular controversies. This conception of the respective roles of legislators and judges may be seen as the background of the constantly repeated doctrine that in the decision of cases by reference to the statute law judges are bound to discover and to follow "legislative intention." According to this theory, interpretative doubts, whether arising from the confusion of statutory language, from the generality of statutory terms, or from the existence of conflicting statutory directions, are to be resolved by judicial resort to an "intention" entertained by the members of the lawmaking body at the time of enactment.

Here again, our supposed case involving the applicability of a "motor vehicle" licensing act to aeroplanes can be used for illustrative purposes. If the court is bound to follow the "legislative intention," and if "intention" is understood as synonymous with "meaning," the court must assign a denotation or connotation to the term "motor vehicle" which is consistent with the understanding of the legislators as to the meaning of that term. It may be that the judge will be able to discover that the draftsmen of the statute used "motor vehicle" with the specific understanding that aeroplanes were to be included within its denotation. If it cannot be determined whether the legislators meant specifically that "motor vehicles" should be taken to include aeroplanes as well as land vehicles, the judge would be bound to discover the connotation which that term suggested to the legislators and to determine the applicability of the statute in the light of that connotation. Some of the inherent difficulties in this process have been suggested in the foregoing discussion.

If the interpretation of statutes is really an operation by which the judges attempt to reproduce the thought in the minds of the members of the legislature, that is, the reference which the legislature sought to communicate through the medium of language, statutory interpretation is practically the same, in its approach, as the interpretation involved in such diverse fields as theology and literary criticism. A classic definition of interpretation is that stated by Lieber in his Legal and Political Hermeneutics:

> "Interpretation is the art of finding out the true sense of any form of words, that is the sense which their author intended to convey, and of enabling others to derive from them the same idea which their author intended to convey."

Analysis of the actual procedures which courts follow in determining characteristic interpretative problems discloses, however, that judicial practice is by no means always consistent with the theory that statutory interpretation involves a judicial endeavor to discover the idea or reference which the members of the enacting legislature meant to convey through the statutory language. The principle that "legistative intention" is the controlling consideration in statutory interpretation is greatly qualified, at least in judicial theory, by the co-existence of the "plain meaning rule," that "if the words of the statute are plain and unambiguous, and do not lead to absurd results, they must be applied," without regard, it will be observed, to "the sense which their author intended to convey." Such established doctrines as the presumption against repeal by implication, the rules of strict construction, and such canons as expressio unius and ejusdem generis are not really guides to the legislative will or understanding but rather rules of judicial policy which irrespective of subjective legislative intention, may be given controlling effect in the application of statutes. The increasing use of extrinsic aids in statutory construction does suggest, however, that judges are usually willing to interpret the words of a statute in "the sense which their author intended to convey," if the actual understanding of the legislators can, in fact, be discovered.

As the first step in any effort to appraise the reality of the concept of "legislative intention" it is necessary to consider the difficulties which are involved in an attempt to reconstruct the state of mind of the members of a legislative body at the time of the enactment of a statute. The judicial problem is, to begin with bound up with the inherent limitations of words as symbols for the communication of ideas.... It is unnecessary here to prove that words do not mean the same thing to all men, or at all times. It is well to recall the characteristic words of Justice Holmes:

> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and context according to the circumstances and the time in which it was used."

course of the passage of an enactment, it is quite often possible to discover that at some stage of the legislative process committee members of other interested legislators had, in fact, come to an understanding with respect to the essential interpretative issue of a given case. Such a discovered "intention" will normally be given full effect by an interpreting judge, although it cannot be shown conclusively that that understanding was shared by each and every member of the legislative authority.

The methods of interpretation employed by the federal courts in the interpretation of Congressional enactments are particularly suggestive. The increasing judicial tendency to accept the "intention" of Congressional committee as the controlling "intention" is certainly justified as a proper recognition of the facts with respect to the functional organization of Congress. This tendency is illustrated by a highly realistic statement of Judge Learned Hand:

> "It is, of course, true that members who vote upon a bill do not all know, probably very few of them know, what has taken place in committee. On the most rigid theory possibly we ought to assume that they accept the words just as the words read, without any background of amendment or other evidence as t their meaning. But courts have come to treat the facts more really; they recognize that while members deliberately express their position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way."

The concept of "legislative intention" can be said to possess validity in the theory and practice of statutory interpretation, if proof of unanimity of understanding be dispensed with for practical reasons. Thus it would seem that a judge is but following the best available evidence if he adopts a construction shown to have been put upon an enactment in one house of Congress, although there is no evidence either way as to whether that meaning was, in fact, understood in the other house. As a matter of probability, it is surely more likely that the same construction will have been put upon a statutory proposal in both houses than that a construction reached by a judge, unaided and perhaps years after the event, will be consistent with the legislative understanding in both houses, or in either of them.

The drafting of statutes by executive and administrative officers, or by other expert draftsmen who are not members of the enacting legislature, raises a question of practical as well as of theoretical significance. Judicial research into the legislative sources may fail to disclose any evidence of "legislative intention," in the sense of an understanding by the legislators, or by

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any of them, with respect to the interpretative issue of a given case. Under such cirsumstances, should an interpreting court give any weight to an expressed "intention" or understanding of the non-legislative draftsman? The writer has encountered a few cases in which judges have given consideration to the explanations of non-legislative draftsmen, but the theory upon which such attention was paid seems not to have been made clear. The scope of the present discussion prevents full analysis of the problem, but its significance is evident, for example with respect to the interpretation of the Uniform Acts, in which geographical uniformity of construction is of the essence of the program. It would seem, as to the interpretation of all statutes, that a strong argument for judicial consideration of non-legislative "intention" of this character can be premised upon the need for basic consistency of direction in the judicial exposition of integrated legislative policies.

Originative Aspects of Judicial Thinking in Interpretation

Up to this point, the discussion has been concerned primarily with the difficulties involved in judicial discovery of "legislative intention," in the sense of the construction put upon statutory language by those responsible for its adoption. The assumption has been that at least a few immediately interested legislators had, in fact, forseen the essential interpretative issue raised in a given case, had actually come to a conclusion with respect to it, and had sought to communicate their will as to the effect to be given to the statute. Even upon the level of discovery of a pre-existing legislative understanding, more or less specific with respect to particular interpretative issues, the judicial application of statute law is far from a mechanical deductive process.

In the majority of cases circumstances demand more of the judge than the discovery of an earlier, actually entertained, legislative understanding. The thought of the members of the legislature, or any of them, may never have been directed, even in the most general outline, to the essential interpretative issue of a case at bar. For example, if the controversy is one in which the interpretative problem involves a choice between two possibly applicable and conflicting statutes, the probability is that the thought of the legislators, with respect to the later statute, included no reference at all to the earliest enactment. If the legislators had been aware of the possible conflict between the statutes, they would doubtless have made clear their will as to which should be given controlling effect.

By way of further illustration of the limitations of the process of discovery in statutory interpretation, one final use can be made of the supposed case in which a court is called upon to decide whether the mandate of a "motor vehicle" licensing law applies to aeroplanes. If it be assumed for the moment that the statue in question had been enacted before the development of air transportation, it is clear that judicial reproduction of the construction places upon the statutory terminology would afford no certain indication as to whether or not aeroplanes should be classified as "motor vehicles," within the meaning of the statute. Obviously the legislators could not be said to have used the term, "motor vehicles" with the understanding that aeroplanes, then unknown, were within its denotation. Moreover, mere judicial discovery of the connotation which the term, "motor vehicle" bore to the legislators would not greatly assist the court in determining the proper classification of aeroplanes, since, by the nature of the case, the thought of the members of the legislature could never have been taken as an essential attribute of all of the particular objects within the statutory class, "motor vehicles."

In short, it is impossible to say that the members of a legislative body have had any "intention," in the sense of a construction placed upon the language of a statute, with respect to interpretative issues raised by the existence or occurence of objects, events, or other circumstances which were not in existence at the time of the enactment. Other objects or events, which were in existence at the time, may never have come to the attention of the legislators. Statutes, after all, are not formulated in abstraction. The occasion for the enactment of legislation is the desire on the part of legislators, often under heavy pressure from constituents, to attain certain particular objectives. It is inevitable that the attention of the draftsmen of an act will be directed, for the most part, to the choice of such language as will guarantee the particular results desired. Only incidentally does the average legislator consider the general effects which a statute may have upon interests or activities beyond the immediate objectives of its enactment. Thus, the most difficult questions of statutory construction are those in which it cannot be said that the legislators have had any "intention" at all, in the sense of an understanding of the meaning or legal effect of the statute with respect to particular interpretative issues.

From the language which judges employ in cases involving the application of the statute law, it would seem that they consider their action to be but the search for and application of a single true meaning, which has a real and ascertainable existence in the statute, or rather in the legislative mind. It has been shown, however, that in a great many cases the most diligent of judicial research, including careful examination of the legislative records, will not reveal any conclusive evidence either way as to the understood effect of a statute in particular situations of fact. In such cases the theory that the judge is always bound by pre-existing rules of law is as inappropriate as it has been shown to be in certain areas of common law decision. The conclusion of the judge, as to the meaning and effect of the statute, is in no sense predetermined; it is clearly originative judicial action.

The conception here advanced that judges must frequently act legislatively in determining the legal effect to be given to a statute is not really inconsistent with one line of established doctrine expressed in the American and English cases. The phrase, "legislative intention," may be taken to signify the teleological concept of legislative purpose, as well as the more immediate concept of legislative meaning. In the famous sixteenth century opinion in Heydon's Case, which gave classic formulation to the doctrine that statutes should be interpreted in the light of the evil and the remedy, the duty of judges was said to be "to all force and life to the cure and remedy, according to the true intent of the makers of the act." Similarly, in many modern cases, the principle that courts are bound to follow "legislative intention" has been taken to mean that, in determining the effect of a statute in cases of interpretative doubt, the judge should decide in such a way as will advance the general objectives which, in his judgement, the legislators sought to attain by enactment of the legislation.

Every considered statute, in effect, embodies a decision on the part of the responsible legislators that a certain projected ordering of conduct will be just and socially beneficial. For example, the much litigated British housing legislation reflected a value judgment of a Parliamentary majority that the social interest in decent housing is great enough to justify severe interference with common law property rights. A judge will often differ with the conclusions of fact or with the judgments of value which have caused the members of a legislative body to adopt a controversial statutory policy. The principle that doubtful questions should be resolved in accordance with "legislative intention" requires, in this significance of "intention" that the judge interpret the statute not in the light of his own personal notions of justice and expediency but in the light of the legislative conceptions of justice and expediency which underly the policy of the enactment.

It must be kept in mind that so-called interpretation, on issues which were wholly beyond the foresight of the draftsmen of a statute, is, itself, legislative in character. The substantial issue is whether the inevitable judicial legislation is to forward the policy of the legislative authority or to retard its fulfillment. The judge, when he must act as a lawmaker to fill in the gaps of a statute, exercises not original legislative power but delegated power, comparable to that conferred upon administrative officers possessed of rule-making or

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subordinate legislative authority. Each has the duty of implementing the general policy of an enactment with detailed rules applying that policy to the infinite variety of unforeseeable particular situations of fact. The circumstance that judicial legislation is, in effect, retroactive, is but another reason for insisting upon the necessity of its consistency with the general legislative policy.

The writer does not mean to suggest that legislatures consciously delegate subordinate legislative power to the courts, although, as a matter of compromise in the legislature, the exact meaning of doubtful phrases is occasionally left to the courts by legislators unable to agree upon the exact formulation of difficulty or highly controversial statutes. The fact is simply that the exercise of subordinate legislative power in certain cases is inevitable. Judges, in this creative phase of statutory interpretation, must discover the facts needed as the basis of action in such sources as the hearings and reports of investigatory committees and commissions and the records of legislative proceedings and debates. As a *delegate*, the judge should guide his action by the policy or purpose which the legislative majority has deliberately adopted, and his need for understanding of that policy requires that he discover the conclusions of fact and the judgments of value which seemed conpelling to the legislators. As a *legislator*, the judge must have sufficient comprehension of the conditions and activities which his interstitial legislation will affect to enable him to make effective implementing rules, in the form of the particular decisions handed down in the "interpretation" of the act.

In our law the courts, for the most part, have rejected the civil law notion that the general principles drawn from statutes may be made use of as bases for analogy in the decision of cases which do not fall within the broadest possible meaning of statutory language. But the application of the statute law has never been restricted solely to the fact situations actually and specifically foreseen by the members of the enacting legislature. Within the range of the broadest and narrowest possible meaning of statutes judges must make law, because there is no pre-existing law to discover. Even today, the greater number of the legal rules which courts apply are of legislative origin. If the growth of the law is to be consistent in its direction, judges must approach the statute law scientifically, sympathetically, and with full comprehension of its legislative and social backgrounds.*

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B. The Administrative Process

The area of the legal process with which people most frequently come into contact in everyday life is the administrative process. Particularly with the growth of government since the 1930's, the administrative process and administrators have become the most visable part of the legal process. Administrators and the administrative process are those people and institutions with the responsibility of carrying out the day to day operations of the government. The administrative process is directed in its work by the executive branch of the government, and given power by the legislative branch. Some of the decisions and activities of the administrative process are subject to the scrutiny of the courts.[1]

The administrative process is in many ways the most difficult of the three types of legal process with which to deal intellectually or in practical situations. It combines in its structure elements of both the judicial and the legislative process. Many administrative agencies make regulations which look and act very much like statutes. The same administrative agencies may be involved in settling disputes and handing down opinions in a way which looks very much like a court.[2] To make understanding the process even more difficult, there is not very much similarity in the process, powers, or practical workings of any of the individual agencies. The Federal Aviation Agency proceedures tell us nothing of what to expect from the Social Security Administration. The operation of administrative branches of the Federal Agriculture Department have little bearing on the inner workings of a state welfare agency.

The administrative process, in the most general sense, is that process by which an administrative agency carries out its responsibility on a day to day basis. The actual duties of the agency depend upon the responsibility and powers given to it in the legislation under which it operates. The actual methods of operation which it adopts derive for the most part from the particular needs of the specific area in which it operates. The process may include a variety of activities or concentrate in a single area. A single administrative agency may be charged with setting up more specific regulations which make it possible to enfore the general legislation which created the agency; it may make investigations to determine the effectiveness of both the legislation and its own regulations; and it may hear disputes which arise under those regulations. An administrative agency may also have the power to decide who will be given certain privileges and for how long. For example, both the Federal Aviation Agency and the Federal Communications Commission have vast powers, with great effect on both the business world and the country at large, to decide who shall operate in their particular areas of authority for how long and at what intervals.

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[1] Just how much of the administrative process is subject to judicial review is a source of much argument among scholars of administrative law. The contsolling elements are supposed to be the language of the enabling legislation and principles of constitutional law. However, there is no clear set of rules dealing with the problem even after virtually thousands of cases in the area.

[2] One of the administrative agencies which deals with Federal Taxes is even called the Tax Court, although it is in fact a part of the Internal Revenue Service and not a court at all.

The depth to which an agency may be involved in an individual's life and the complexity of its procedures and duties can be exemplified by looking at any state welfare department. In most states the welfare agencies have the power to construct regulations by which the local agencies determine which people are eligable for which programs of public aid. These regulations must also fit with the federal guidelines if there is any federal money involved in the programs which they are administrating. A welfare department may have only broad guidelines to follow in deciding who is and who is not entitled to various kinds of public assistance. Another difficult problem with which welfare departments must deal is that they are given a finite amount of money to deal with and potentially infinite number of welfare recipients. In order to carry out their responsibility, welfare departments must make specific regulations to determine who is eligable for welfare, make investigations to determine which applicants fit their eligability requirements, hand out the money, revoke the right to funds when they feel their regulations have been breached, and have hearings to settle complaints of the recipients. In one department are people acting like legislators, administrators, and judges.

At the heart of the administrative process, and that mystical something which does separate it from the other two branches of the legal process, is the administrative process' reliance upon informal procedures. If the administrative process were confined to the rules and requirements of the courts or the legislature it would lose most of its reason for being. It is the fact that administrators can deal in a moderately informal and simplified way with the day to day problems of the workings of the government in our society, combined with the expertise in the special field in which it works, which distinguishes the yeoman service our administrative agencies give. It would be impossible for the legislative process or the judicial process to handle the great bulk of cases with the efficiency of a single administrative process in each substantive area. One advantage of the administrative process is that it gives departments a chance to develop expertise in a specific area and to use that expertise

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in the daily solution of problems. Not every legislator or judge is an expert in the intricacies of the tax code or the technical problems of using the airwaves most efficiently. However, one can expect that the administrators working in each area have at least a high degree of familiarity with the complex and specific questions which must be answered every day.

Many people have many objections to the administrative process as it operates in this country. The word buracracy has become an epithet of sorts. One objection is that the number of regulations, rules and steps that must be followed has become so complex in every area that the efficiency touted as a value of the administrative process is in fact non-existent. This complaint seems to have special validity in those areas in which there is overlapping of agency function. Another complaint is that the complexities of the process make it impossible for a single individual to deal in a meaningful way with his government. Finally, many people worry about the grave injuries that the administrative process can inflict upon groups or individuals without adequate protection of Constitutional rights.[3]

There has in the last few years been some movement toward decentralization of the federal government which may have some effects on the administrative process as it grows and changes during the next decade. However, the vast number of services provided by the government make it unlikely that the buracracy will become smaller and more likely that it will simply relocate and decentralize.

Regulations and Procedures of the Administrative Process.

As previously noted, it is almost impossible to make any generalizations about the administrative process in this country. The powers, regulations and procedures of each agency vary with the function it performs. It is important, however, to be aware of how to find out about a particular agency. The first thing to find out is where the agency gets its power and the limits of that power. This can be accomplished by finding the particular state of federal legislation which provided for the creation of the administrative agency in which you are interested. Secondly, you can get some feeling for the direction which the agency has taken by finding any executive orders which may deal with the workings of the agency. Finally, the actual workings of the agency and the regulations under which it operates and by which it expects those who deal with it to operate should be made available to the public in some way. Since most administrative agencies have extremely complex regulations and interpretations of those regulations, a look at the direct source material would probably best be done by a lawyer. However, it is possible to find with reasonable ease such things as eligability requirements, of the particular public involved with the agency.

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[3] Welfare agencies, draft boards, and the Immigration and Passport agency have been particular targets of civil libertarions in this country.

The following excerpt from the Administrative Procedure Act should give you some feeling for the most basic ground rules under which Federal Administrative agencies operate.

ADMINISTRATIVE PROCEDURE ACT

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60 Stat. 237 (1946), 5 U.S.C.A. § 1001
(The only amendments are additions of the words contained in brackets in Section 2 (a). Section 11 is affected by Reorganization Plan No. 5 of 1949, 14 Fed. Reg. 5227.)

Section 1. This Act may be cited as the "Administrative Procedure Act."

DEFINITIONS

Sec. 2. As used in this Act--

(a) Agency.-- "Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940; Contract Settlement Act of 1944; Surplus Property Act of 1944; (Sugar Control Extension Act of 1947; Housing and Rent Act of 1947; and the Veterans' Emergency Housing Act of 1946.)

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(b) Person and Party.-- "Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) Rule and Rule Making -- "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or re-organizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and Adjudication.-- "order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) License and Licensing.-- "License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) Sanction and Relief.-- "Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

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(g) Agency Proceeding and Action.-- "Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency Action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency--

(a) Rules.-- Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or request; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reprots, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Opinions and Orders.-- Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) Public Records.-- Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found.

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RULE MAKING

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts--

(a) Notice.-- General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the findings and a brief statement of the reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.-- After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective Dates.-- The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions.-- Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

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ADJUDICATION

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure or an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of miliatry, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives--

(a) Notice.-- Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) Procedure.-- The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) Separation of Functions.-- The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engeged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining

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applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) Declaratory Orders.-- The agency is authorized in its sound discretion, with like effect as in the case of other orders to issue a declaratory order to terminate a controversy or remove uncertainty.

C. The Judicial Process

It is the judicial process about which most Americans think when they think about the law. The judicial process has its focus in those proceedings that occur before judges. Contrary to the view presented on most American television programs, the judicial process encompasses many procedures that do not incorporate the use of the jury. The focus of the judicial process is the settling of disputes, through a complex set of rules designed both to expidite the process and to give some insurance of the maximum amount of fairness possible to all of the parties involved.

The Adversary System

At the heart of the judicial process in the United States is the Adversary System by which the whole procedure operates. In this country judges and juries are not themselves empowered to bring cases or even make investigations of their own initiative. Neither, for the most part, do judges or juries collect evidence.[1] Instead we rely on the parties involved in the matter to bring the evidence into court, and ask that the judge and jury decide on the relative truthfulness of the evidence to determine the winner of the individual conflict. The adversary system relies upon the parties in the conflict to bring the case itself into the courts and to amass and present the arguments and evidence in favor of their individual positions in the case.

While the judge may determine whether the evidence is in proper form to be heard in the court, and may on occasion even ask a question or two of the witnesses, he does not himself direct the substance of the evidence so much as he insures that it comes into the courtroom in proper form. It is important to note that in terms of the actual evidence, the adversary system holds true at all levels of the judicial process. The judge does use his own initiative, again however following the leads of the parties, in investigating both case and statutory law, to determine what legal conclusions follow from the evidence produced.

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[1] The grand jury which in many instances has the power to decide on the permissability of an indictment in criminal cases is still pretty much at the mercy of the prosecuter in terms of the scope of the evidence which it hears. The grand jurors, unlike the jurors in a normal trial situation do have the right to ask questions and request that certain matters be evidence or witnesses be brought before them. The end product however is not conviction, but merely a proper charge.

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The reasoning underlying the adversary system is that if the purpose of the courts is to settle conflicts, we can rely on the parties involved to bring these conflicts into the judicial system and can further rely on them to present the evidence most favorable to their side. If each party is allowed to present his case in the most favorable light and the jduge and jury decide on the basis of those presentations, then neither side can complain at the outcome of the decision. The point of the judicial system then is to decide conflicts, with some consistency, and not to find some sort of ultimate truth about the situation itself.

The most obvious difficulty with the adversary system is that it is based on the assumption that both parties have equal power to bring their stories to the attention of the court. It has become clear in the last two decades that in fact this basic assumption is a false one. Many of our citizens have neither the understanding nor the resources to hire or find the necessary legal representation to get them into the process as equal participants. The courts have recognized the need for providing council in criminal cases, from the seminal case of Gideon v. Wamright, through its subsequent interpretations. However, they have yet to recognize the handicap that not having counsel imposes upon anyone who is a party, plaintiff, or defendant, to a civil suit. The judicial process is a complex one and it is impossible for a layman to function with the knowledge, ease or success of a trained attorney. The low income citizen, without an attorney simply does not have a chance, whether it is against the state in a criminal case, or against a private party in a civil matter. The private bar has for years insisted that it took the cases of those who could not afford counsel, but in fact this seemed to be limited entirely to those who needed representation in criminal matters. In the last five years the growth of Legal Services Programs under the auspices of the federal government's Office of Economic Opportunity has provided a vital entry in the civil courts to people with low incomes. However the number of the programs operating is still small when compared with the number of low income people needing legal representation of all sorts.

The Federal and State Courts

In addition to the general grouping of courts by type, it is important to understand that courts in this country are also grouped by jurisdiction. The most basic division of jurisdiction is by Federal and State systems. Each state has courts of both trial and appellate level which deal with the problems of interpretation of its own laws, with the conflicts involving its citizens and with matters which take place within its

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geographic boundaries. The Supreme Court of the United States is the final court of appeal from State courts if there is an issue involving the Constitution. Except in a few specific kinds of cases, the Supreme Court of the United States has the right to choose the cases to which it will address itself. This procedure is called certioar. When the Supreme Court of the United States decides to listen to a particular case, it grants a Writ of Certioari to the parties and they then submit their full briefs and are given the chance for oral argument before the courts. There is also a federal system of courts. This system is also bi-level, consisting of Federal District courts at the lowest level, and the Federal Court of Appeals and the Supreme Court as its appellate courts. Federal courts in the main deal with cases involving violation and interpretation of federal statutes, with cases involving citizens of more than one state, and with issues in which a constitutional question as presented in the first instance. It is important to understand that the question of which courts have the right to hear which cases is a difficult field of law in which most generalizations break down at some point.

Criminal and Civil Courts

The trial courts in state systems are sometimes designated as to function. Some courts handle only criminal matters and some only civil matters. This does not mean that they are courts of different levels, but only that, to the end of greater efficiency, they specialize in certain types of cases. This is particularly helpful as there is much difference in the procedure followed in criminal and civil cases. State court systems are sometimes divided further by function. There are courts, all at the trial level, for family problems, juvenile courts, traffic courts, small claims courts, divorce courts and even courts dealing with nothing but landlord tenant problems. The degree to which an individual state court system is specialized at the trial level depends for the most part upon the press of business. The more cases a system has to handle, the more efficient it is to divide the courts by specific function. Federal District courts are usually not divided in this manner. The same judges sit in both criminal and civil trials. No matter the division of the lower courts, appellate court deal with all cases and are not divided by subject matter.

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Trial and Appellate Courts

Another feature of our judicial process is that it is in essence a double level system. Courts in our country fall into two general classifications. The lowest level, and the level at which the parties generally enter the judicial process, is the place in which the facts are presented in as full detail as either of the parties wish. These lower courts are the trial courts. There are several kinds of trial courts possible, and the exact number depend upon the system in the individual state. Most states have at the lowest level which deal with misdemeanors or matters in which a small amount of money or property is at stake. For the most parts these lowest courts do not have juries, but operate simply with a judge and sometimes as in small claims courts, without lawyers. People whose cases would normally be heard in these courts usually have the right to ask for a jury trial.[2] If such a request is made the case is transferred to a slightly higher court in which juries operate. The courts at this level, for our purposes called Trial Courts, hear the evidence of both parties, find facts and also apply the necessary case of statute law.

The second kind of court is the appellate court. In the United States, parties are given a chance to appeal the decisions of the trial courts to a higher level court for review. These appellate courts do not refind facts, or take any evidence, but exist solely to review questions of law that may have been improperly decided by the trial courts. They are concerned in the main with issues of statutory interpretation, constitutional questions, interpretation of the holdings of past cases and procedural matters. There may be more than one level of appellate court in an individual state. Most states have an intermediate court of appeals and a state supreme court. The most noticable difference between courts of appeals and most trial courts is that appellate courts always consist of more than one judge. The usual case is for the intermediate panel to consist of judges who sit in panels of three, and for the state supreme court to consist of at least five judges all of whom sit for each case. The highest appellate court in the nation is the United States Supreme Court. A further difference between the appellate and trial courts is in their procedures. The trial court listens not only to the attorney for the parties,

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[2] In some states, it is possible to have a trial without jury in the lowest courts and then, if you lose, to request a trial de novo in a jury court.

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but also to witnesses for either side and may additionally examine physical evidence and exhibits. The appellate courts while they may review any of the proceedings of the trial court below, make their decisions based upon the lower court record, briefs submitted by the parties and their own investigation of past cases and pertinent statutes. They may also, at the request of the parties, hear oral arguments based on the briefs, by the lawyers for each side. During this oral argument, the attorneys can emphasize any points they feel **important**, and the judges are given the opportunity to question the attorneys about any points in the case.

Judges

The judges in our court system are put there in two basic ways. In the federal courts and in some state courts as well, judges are appointed by the executive branch of the government. Federal judges, after appointment by the President, must be ratified by the Senate. All federal judges serve for life. State court judges of all levels are frequently elected and serve for specific terms. In some states, the judges are elected in the regular party system and in others, run as non-partisan candidates. In general state court judges, once having been elected, are not subject to opposition as incumbants. Most judges in this country are lawyers, however there is not any statute which makes the law degree a compulsory qualification for any federal judgeship, and many states follow this federal example.

The role of the judge in the court preceeding is obviously pivital. This is true in lower courts even when the judge has a jury to make decisions as to facts and/or law. The following article indicates some of the problems and questions faced by every trial judge.

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A TRIAL JUDGE'S FREEDOM AND RESPONSIBILITY*

Charles E. Wyzanski, Jr.

Each year when The Association of the Bar of the City of New York meets in memory of Judge Benjamin N. Cardozo, the man fortunate enough to be chosen as "a tapered bearer with a worde" has the pleasure of calling to mind the memory of that revered judge. Those who appeared before him knew his courtesy, humility and purity. Those who read his opinions and essays recall how completely he fulfilled the four-fold prayer of Saint Thomas Aquinas for "sharpness in understanding, sagacity in interpretation, facility in learning, and abundant grace in expression." And to those whose unremitting search is to find the nexus between law and morals his example remains a constant guide. Judge Cardozo did far more than infuse the law of torts, of commerce, and of fiduciary obligations with higher standards of rectitude. He viewed the law in all its branches not solely as an authoritative technique for the resolution of strife, but chiefly as a social process for recognizing and marshalling the values that we prize. Yet he never forgot that in this process the ethical test of the judge is not whether his judgments run parallel to the judgments of a moralist, but whether the judge administers his office true to its traditional limitations as well as to its aspirations.

The tradition in which Judge Cardozo worked and wrote was that of the appellate court. Admittedly this is the most philosophical branch of our calling. There arise the questions of largest generality. Indeed it must often seem that by contrast in the lower courts what counts are not jurisprudential problems but that bundle of individual traits of character and manner[1] which Mr. Justice Shietag has called the "personality of the judge." And yet from the day he takes his seat the trial judge is aware that while he has more personal discretion than the books reveal, he too is hemmed in by a developing tradition of impersonal usages, canons and legitimate expectations. While he has choice, he cannot exercise it even to his own satisfaction unless it is disciplined according to standards. The minima are supplied by reversals administered by appellate courts. Those, however, are necessarily only negative in nature. What counts more than the rooting out of error is the establishment of affirmative norms of judicial behavior.

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[1] Cf. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 163 (1922): "the cases where the controversy turns not upon the rule of law, but upon its application to the facts...call for intelligence and patience and reasonable discernment on the part of the judges who must decide them. But they leave jurisprudence where it stood before."

In discerning these norms, one difficulty is that what transpires in trial courts is not readily available. One man knows the practices only of his own and perhaps a few other courts. And so to evolve standards he must become critical of his own shortcomings, attentive to the reactions of the bar, informed of the unrecorded practices of his colleagues and, above all, reflective about subtle differences in the tasks assigned to him.

I. Judge and Jury

The trial judge's first problem is his relationship to the jury. Much of the debate about the jury system rests on political premises as old as the eighteenth century. Montesquieu, Blackstone and their followers contended that lay tribunals with a plurality of members were the safeguard of liberty. Bentham and more modern reformers replied that when the rule of law itself is sound, its integrity requires that its application be entrusted to magistrates acting alone. In their view, responsibility is the secret of integrity, and a reasoned choice is the secret of responsibility.

Experience will not give a sovereign answer to these warring contentions. Yet the disagreement can be narrowed if the question of the jury's utility is subdivided with specific emphasis on separate types of suits.

The importance of this subdivision may be concealed by the striking phrase that a federal judge is the "governor of the trial."[2] Some regard this as an implied acceptance of the practice of English courts.[3] And others construe it as a broad invitation to exercise in all types of cases a right to comment upon the evidence, provided of course, that the judge always reminds the jury in his charge that they are not bound to follow the court's view of the facts or the credibility of the witnesses. But such boldness is not the surest way to end disputes in all types of cases.

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[2] The phrase comes from several Supreme Court opinions, the most notable being that of Hughes, C. J., in Quercia v. United States, 289 U.S. 466, 469 (1933).

[3] Yet no federal judge would be likely to give as detailed, as long, or as leading a charge as say Lord Wright's admirable summing up in The Royal Mail Case, see NOTABLE BRITISH TRIALS, THE ROYAL MAIL CASE 222-62 (Brooks ed. 1933); or Lord Chief Justice Goddard's summing up in The Laski Libel Action, see THE LASKI LIBEL ACTION 367-98 (1947). Lord Wright's charge must have lasted at least four hours and Lord Goddard's two.

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A. Tort Cases

The trial judge's comments upon evidence are particularly unwelcome in defamation cases. In 1944 a discharged OPA official brought a libel suit against the radio commentator, Fulton Lewis, Jr. At one stage in the examination, I suggested that Mr. Lewis' counsel was throwing pepper in the eyes of the jury; and at the final summation, I indicated plainly enough that, although the jury was free to reject my opinion, I thought Mr. Lewis has been reckless in his calumnious charges against the ex-OPA official. It makes no difference whether what I said was true; I should not have said it, as the reaction of the bar and public reminded me. A political libel suit is the modern substitute for ordeal by battle. It is the means which society has chosen to induce bitter partisans to wager money instead of instead of exchanging bloody noses. And in such a contest, the prudent and second-thinking judge will stand severely aside, acting merely as a referee applying the Marquis of Queensberry rules. In a later trial of a libel suit brought by James Michael Curley, the gravamen of the complaint was that the Saturday Evening Post had said that Mr. Curley was a Catholic of whom His Eminence, Cardinal O'Connell would have no part. Who knew better than the Cardinal whether that charge was true? Mr. Curley, the plaintiff, did not call the Cardinal to the stand. The defendant's distinguished counsel did not desire to find out what would be the effect upon a Catholic prelate to the witness stand. Should the court have intervened and summoned the Cardinal on its own initiative? The Fulton Lewis case gave the answer. In a political[4] libel suit, the judge is not the commander but merely the umpire.

Those tort cases which involve sordid family disputes also are better left to the jury without too explicit instructions. Plato implied and Holmes explicitly stated that judges are apt to be naive men. If judges seem to comment on the morality of conduct or the extent of damages, they discover that the jurors entirely disregard the comment because they believe that their own knowledge of such matters is more extensive than the judges'. At any rate, when brother sues brother, or when spouse sues paramour,[5] the very anonymity of the jury's judgment often does more to still the controversy than the most clearly reasoned opinion or charge of an identified judge could have done.

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[4] In a libel suit where political and like emotional elements are absent, a judge may do as well as a jury. Cf. Kelly v. Loew's, Inc., 76 F. Supp. 473 (D. Mass. 1948).

[5] Gordon v. Parker, 83 F. Supp. 40, 43, 45 (D. Mass.), aff'd, 178 F. 2d 888 (1st Cir. 1949). It may be said that divorce cases are contrary to my thesis. But is it not true that most divorce cases involve either no contest or an attempt by the judge to act as conciliator?

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What of the trial judge's role in accident cases? How far should he go in requiring available evidence to be produced, in commenting on the testimony, and in using special verdicts[6] and like devices to seek to keep the jury within the precise bounds laid down by the appellate courts? There are some who would say that the trial judge has not fulfilled his moral obligation if he merely states clearly the law regarding negligence, causation, contributory fault, and types of recoverable damage. In their opinion it is his duty to analyze the evidence and demonstrate where the evidence seems strong or thin and where it appears reliable or untrustworthy. But most federal judges do not make such analyses. They are not deterred through laziness, a sentimental regard for the afflatus of the Seventh Amendment, or even a fear of reversal.[7] They are mindful that the community no longer accepts as completely valid legal principles basing liability upon fault.[8] They perceive a general recognition of the inevitability of numerous accidents in modern life, which has made insurance widely available and widely used. Workmen's compensation acts and other social and economic legislation have revealed a trend that did not exist when the common law doctrines of tort were formulated. And the judges sense a new climate of public opinion which rates security as one of the chief goals of men.

Where there is a bitter contest, many divorce court judges, I believe, would rather have the issue put to a jury, if that were possible.

[6] A special verdict in a tort case, by minimizing the emotional considerations is more likely than a general verdict to produce a judgment for defendant. Mills v. Eastern Steamship Lines, Inc., Civil No. 7366, (D. Mass.) Dec. 3, 1948. Perhaps this consideration was not absent in the different approaches disclosed in the opinions of Judge Clak and Judge Frank in Morris v. Pennsylvania R.R., 187 F. 2d 837, 840-41, 843 (2d Cir. 1951). See also Skidmore v. Baltimore & Ohio R.R., 167 F. 2d 54, 65-67, 70 (2d Cir. 1948).

[7] It would, however, be less than candid for an inferior federal judge to deny the indirect, as well as the direct, effect of recent decisions of the Supreme Court of the United States tending toward leaving large scope to juries in accident cases. See Wilerson v. McCarthy, 336 U.S. 53 (1949); Bailey v. Central Vermont Ry., 319 U.S. 350 (1943), and the cases there collated.

[8] In 1897 Holmes wrote, "why do the jury generally find for the plaintiff if the case is allowed to go to them?...the traditional policy of our law is to confine liability to cases where a prudent man might have foreseen the injury, or at least the danger, while the inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal." Holmes, The Path of the Law, 10 HARV. L. REV. 457, 466 (1897); HOLMES, COLLECTED LEGAL PAPERS 167, 182 (1920). Two years later he said, "one reason why I believe in our practice of leaving questions of negligence to them is what is precisely one of their gravest defects from the point

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Trial judges cannot, without violating their oaths, bow directly to this altered policy.[9] In instructions of law they must repeat the doctrines which judges of superior courts formulated and which only they or the legislatures can change. But trial judges are not giving "rein to the passional element of our nature" nor forswearing themselves by following Lord Coke's maxim that "the jurors are chancellors." Traditionally juries are the device by which the rigor of the law is modified pending the enactment of new statutes.

Some will say that this abdication is not merely cowardly but ignores the :French saying about small reforms being the worst enemies of great reforms." To them, the proper course would be to apply the ancient rules with full rigidity in the anticipation of adverse reactions leading to a complete resurvey of accident law; to a scrutiny of the costs, delays and burdens of present litigation; to a comparative study of what injured persons actually get in cash as a result of lawsuits, settlements out of court, administrative compensation proceedings and other types of insurance plans; and ultimately to a new codification. To this one answer is that in Anglo-American legal history reform has rarely come as a result of prompt, comprehensive investigation and legislation. The usual course has been by resort to juries,[10] to fictions, to compromises with logic. Only at the last stages are outright changes in the formal rules announced by the legislators or the appellate judges. This is consistent with Burke's principle that "reform is impracticable in the sense of an abrupt reconstruction of society, and can only be understood as the gradual modification of a complex structure."

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of view of their theoretical function: that they will introduce into their verdict a certain amount--a very large amount, so far as I have observed--of popular prejudice, and thus keep the administration of the law in accord with the wishes and feelings of the community." Holmes, Law in Science and Science in Law, 12 HARV. L. REV. 443, 459-60 (1899); HOLMES, COLLECTED LEGAL PAPERS 210, 237-38 (1920). As to whether today the formal test of appellate judges has changed from liability tor fault, compare Douglas, J., concurring in Wilkerson V. McCarthy, 336 U.S. 53, 70 (1949), with Jackson, J., dissenting in id. at 76.

[9] There are some judges who take this altered policy into account in inducing parties to settle. No study of the living law of torts can properly neglect the importance of these settlements. They have increased at a rapid rate as a consequence of congested dockets and the wider use of pre-trial techniques encouraged by Rule 16 of the Federal Rules of Civil Proceuure. They are popular with the bar and many clients. They ease the otherwise insupportable load on the judicial system. And they make even the judge who does not approve of the degree to which other judges induce settlements unwilling to take strong measures to lead a jury in directions contrary to those upon which settlements have been and will be reached.

[10] In Chapters VIII and IX of Courts on Trial (1949), Judge Frank,

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Parenthetically, let me say that I am not at all clear that it would be a desirable reform in tort cases to substitute trial by judges for trial by juries. Just such a substitution has been made in the Federal Tort Claims Act. And experience under that statute does not prove that in this type of case a single professional is as satisfactory a tribunal as a group of laymen of mixed backgrounds. In estimating how a reasonable and prudent man would act, judges' court experience counts for no more than juries' out-of-court experience.[11] In determining the credibility of that type of witness who appears in accident cases an expert tribunal is somewhat too ready to see a familiar pattern. Shrewdness founded on skepticism and sophistication has its place in scrutinizing the stories of witnesses. But there is a danger that the professional trier of fact will expect people of varied callings and cultures to reach levels of observation and narration which would not be expected by men of the witness' own background. Moreover, when it comes to a calculation of damages under the flexible rules of tort law the estimate of what loss the plaintiff suffered can best be made by men who know different standards of working and living in our society. Indeed I have heard federal judges confess that in a Federal Tort Claims Act case they try to make their judgments correspond with what they believe a jury would do in a private case. And not a few judges would prefer to have such cases tried by juries.[12]

B. Commercial Litigation

In commercial cases and those arising under regulatory statutes there is reason to hold a jury by a much tighter rein than in tort cases. This is not because the rules of law are more consonant with prevailing notions of justice.[13]

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while admitting that some reforms are attributable to jury lawlessness, in general distrusts such methods. He suggests that certainty and equality are impossible because one jury differs so much from another. This difference he says is recognized by the bar which gives great attention to the selection of jurors (pp. 120-21). This argument may be overstated. In the Massachusetts District there are rarely more than two or three challenges to jurors in any but criminal cases. It ordinarily takes less than five minutes and in the last decade has never taken more than half an hour to select a jury. And these juries tend to act so uniformly that the court officers and attendants who have sat with hundreds of juries can make a substantially accurate prediction of how any given jury will act. Indeed, their prediction of jury action is much closer to the ultimate result than their prediction of judicial actions.

[11] In setting the standard of conduct for reasonable automobile drivers who approach railroad grade crossings, as great a judge as Holmes made an error that no jury would have made. Baltimore & Ohio

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In these controversies judges have a specialized knowledge. Parties have usually acted with specific reference to their legal rights,[14] and departures from the declared standard would undermine the legislative declaration and would be likely to produce confusion and further litigation rather than reform. An extreme example will serve as an illustration. In a tax case tried before a jury at the suit of one holder of International Match Company preference stock, the issue was whether for tax purposes those certificates had become worthless in the year 1936. In another taxpayer's case the Second Circuit Court of Appeals had affirmed a ruling of the Board of Tax Appeals that similar stock had become valueless in the year 1932. Technically this adjudication did not bind the jury, though the evidence before it was substantially the same as that in the earlier case. To preserve uniformity on a factual tax problem of general application I had no hesitation in strongly intimating to the jury that they should reach the same result as the Second Circuit.

In sales cases, moreover, something close to a scientific appraisal of the facts is possible. There are strong mercantile interests favoring certainty and future litigation can be reduced by strict adherence to carefully prescribed statutory standards. These considerations sometimes warrant giving juries written instructions or summaries and often warrant the use of special verdicts. Either method makes jurors focus precisely on the formalities of the contract, the warranties alleged to have been broken, the types of damage alleged to have been sustained, and the allowable formulae for calculating those damages. Indeed, except for tort cases, I find myself in agreement with Judge Frank that the trial judge ought to use special verdicts to a much larger extent, though it is more difficult than may at first be realized to frame questions to the satisfaction of counsel and to the comprehension of juries. Once when I used what I thought simple questions, a fellow judge, half in jest, accused me of trying to promote a disagreement of the jury and thus to force a settlement.

R. R. v. Goodman, 275 U. S. 66 (1927).

[12] This paragraph is admittedly contrary to the views expressed by Judge Frank in Courts on Trial (p. 137-38). He assumes that no judge would give juries jurisdiction over types of cases that are now tried without a jury.

[13] No doubt there are some judges who distinguish between the enforcement of apparently fair contracts and contracts in which advantage has been taken of a necessitous party. In the latter group sometimes fall not merely releases but installment contracts, leases and loans. But I have not observed in the federal courts a tendency to encourage jury lawlessness in these controversies.

[14] Although there are some exceptions, usually parties to an accident case have acted without reference to the law, whereas the law has been one of the considerations in contemplation when parties

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The arguments supporting special verdicts in commercial or statutory cases also support a trial judge in giving in such cases a more detailed charge and more specific guidance in estimating the testimony. In complicated cases or those in fields where the experience of the average juror is much less than that of the average judge, there is a substantial risk of a miscarriage of justice unless the judge points rather plainly to the "knots" in the evidence and suggests how they can be unravelled. The only time I have ever entered judgment notwithstanding a verdict was in a private antitrust suit. The jury had awarded damages of over one million dollars due, I believe, to the generality of my instructions. I should have spent as much time on my charge in helping them understand the testimony as I later spent on the memorandum in which I analyzed the evidence for an appellate court. And one of the few totally irrational awards that I have seen a jury make came in a compromise verdict in a breach of contract case brought by a plaintiff of foreign birth against a defendant who came from the dominant local group. The charge had stopped with broad, though probably correct, statements of the substantive law. The jury should have been told that their choice lay between only two alternatives--either to find for the plaintiff for the full amount claimed or to find for the defendant. Any intermediate sum could be attributable only to a discount for prejudice or a bounty for sympathy.

C. Criminal Prosecutions

At the trial of criminal cases the judge's role more closely resembles his role in tort cases than in commercial litigation. About ninety percent of all defendants in the federal courts plead guilty. In those federal cases which come to trial the crime charged frequently concerns economic facts, and generally, though not invariably, the preliminary investigation by the FBI and other agencies of detection had reduced to a small compass the area of doubt. Often the only remaining substantive issue of significance is whether the defendant acted "knowingly." Indeed, the usual federal criminal trial is as apt to turn on whether the prosecution has procured its evidence in accordance with law and is presenting it fairly, as on whether the defendant is guilty as charged. All these factors combine to concentrate the judge's attention upon the avoidance of prejudicial inquires,[15] confusion of proof[16] and inflammatory arguments. Counsel can aid the judge to maintain the proper

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to a commercial transaction took their action. The chief exceptions are where the tort defendant failed to take out insurance because he supposed there was no risk of liability save for misconduct, and the rare case where a contract defendant made or broke his promise without attention to the written rules of law.

[15] Problems of discretion such as are presented in Michelson v. United States, 335 U. S. 469 (1948), are probably tending toward

atmosphere by stipulation,[17] by refraining from putting doubtful questions until the judge has ruled at the bench, and by other co-operative efforts. But if cooperation is not forthcoming, the judge should hesitate to fill the gap by becoming himself a participant in the interrogation or to indicate any view of the evidence.[18] For the criminal trial is as much a ceremony as an investigation. Dignity and forbearance are almost the chief desiderata.

But as Mr. Justice McCardie said, "Anyone can try a criminal case. The real problem arises when the judge has to decide what punishment to award." On the sentencing problem, three observations may be worth making:

(1) Despite the latitude permitted by the Due Process Clause, it seems to me that a judge in considering his sentence, just as in trying a defendant should never take into account any evidence, report or other fact which is not brought to the attention of defendant's counsel with opportunity to rebut it. Audi alteram partem, if it is not a universal principle of democratic justice, is at any rate sufficiently well-founded not to be departed from a trial judge when he is performing his most important function. In those

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crystallization in different districts. In the Massachusetts District the judges are reluctant to allow reputation witnesses to be asked about defandant's prior crimes unless closely related to veracity. United States v. Gaunt, Crim. No. 18, 201, D. Mass., October 10, 1949, modified and aff'd, 184 F. 2d 284 (1st Cir. 1950), cert. denied, 340 U.S. 917 (1951). See Shientag, Cross-Examination--A Judge's Viewpoint, 3 THE RECORD 12, 19-20 (1948).

[16] As is well recognized, risk of confusion and hence judicial responsibility is greatest in conspiracy cases. See the opinion of Jackson, J., in Krulewitch v. U.S. 440 453 (1949).

[17] Although there is no provision in the federal criminal rules for pre-trial, my own experience is that counsel in complicated cases often welcome pre-trial stipulations. In the scores of separate prosecutions for conspiracy to defraud the United States by false time-slips at the Bethlehem-Hingham Yard which followed McGunnigal v. United States, 151 F 2d 162 (1st Cir.), cert. denied, 326 U.S. 776 (1945), each defendant, who was tried separately, agreed to stipulate every underlying fact except his personal participation. This reduced the time of trial from over a week to less than half a day. And some of the defendants were, in my opinion, justifiably acquitted. Similar stipulations have been successful in Dyer Act conspiracies and conspiracies to violate the alcohol tax laws.

[18] But cf. Frankfurter, J., concurring in Andres v. United States, 333 U.S. 740, 765 (1948): "The charge is that part of the whole trial which probably exercises the weightiest influence upon jurors. It should guide their understanding..."

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situations where a wife, minister, a doctor or other person is willing to give confidential information to the judge provided that the defendant does not hear it, this information ought to be revealed to the defendant's counsel for scrutiny and reply. This in no sense implies "a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial" or "open court testimony with cross-examination." Other methods will avoid those grave errors which sometimes follow from acting on undisclosed rumor and prejudice.

(2) Another nearly universal principle applicable to criminal sentences is equality of treatment. Despite the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime," the sentencing judge is not the precise equivalent of a doctor giving an individual a medical prescription appropriate to a unique personality. Offenders of the same general type should be treated alike at least in the same community.[19] One reason is grounded on a strictly scientific consideration emphasized by Morris R. Cohen: "We are apt to have more reliable knowledge about classes than about individuals." But a deeper ethical consideration is embedded in an Alexandrian metaphor, "equality is the mother of justice." With this test in mind, I submit that if in the district in which a judge sits his fellow judges have established and insist on following a pattern for dealing with offenders of a particular type, it is his responsibility either to get them to change or to come close to their standard.

(3) My third observation relates to whether a judge should give the reasons for his sentence. Eminent and wise judges have warned me against this. Our judgment, they say, is better than our reasons. And it is vain to attempt to explain the exact proporations attributable to our interest in punishment, retribution, reform, deterrence, even vengeance. But are these arguments valid? For there is grave danger that a sentencing judge will allow his emotion or other transient factors to sway him. The strongest safeguard is for him to act only after formulating a statement of the considerations which he allows himself to take into account. Moreover, the explicit utterance of relevant criteria serves as a guide for future dispositions both by him and other judges.[20]

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[19] A problem inherent in the federal system is whether there should be national equality of treatment. Those who sponsored the revised Federal Corrections Bill were mindful of the significance of a sentence in the area where the court sits as well as in the area where the defendant is imprisoned. See Report of Committee on Punishment for Crime, REP. ATT'Y GEN. 25, 26 (1942).

[20] It may be contended that the grounds for administrative action need be explicitly set forth only when judicial review is permissible, and as an aid to such review, and that since the federal trial judge's sentencing discretion is unreviewable no

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II. Nonjury Trials

A. Handling of Evidence and Extra-judicial Material

In nonjury as in jury cases, a substantial part of the bar prefers to have the judge sit patiently while the evidence comes in and then at the end of the trial summarize the testimony which he believes. This seems the sounder practice in the great bulk of trials. But in cases of public significance, Edmund Burke admonished us: "It is the duty of the Judge to receive every offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance, or corrupt collusion, should not bring it forward. A judge is not placed in that high situation merely as a passive instrument of parties. He has a duty of his own, independent of them, and that duty is to investigate the truth."

Let me give some examples of when I believe the judge has a duty to elicit facts in addition to those that are offered by the parties. The plaintiff, an owner of a multiple dwelling, brought suit for a declaratory judgment seeking to have the premises declared a "hotel" and thus exempt from the rent regulations of the OPA. Only one of the numerous tenants was named as defendant. In the trial the plaintiff offered evidence that the building was a hotel and not an apartment. Due to lack of funds or due to lack of forensic skill, the tenant's counsel failed to shake the stories of the plaintiff's witnesses or to offer adequate testimony to the contrary. Yet if the trial judge had called specialists and others familiar with the community and the property, the evidence would have demonstrated that in truth the building was mere apartment house. I took no step myself to call witnesses or to interrogate those who did testify but, relying exclusively on what the parties offered, entered a judgment declaring the premises a "hotel" and thus exempt. Since this declaration of status became in effect, though not in law, a general rule practically, though not theoretically, binding on scores of persons not actually represented in the proceedings, would it not have been sounder for the court to take a larger initiative in seeing that the record corresponded with reality?

A later controversy of even greater public importance posed a similar problem. In a case still undecided, the United States sued the United Shoe Machinery Corporation for violation of the antitrust laws. Among the issues presented was what was the effect of the corporation's acts upon its customers and upon its competitors.

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grounds need be asserted. This is not a complete answer, for the trial judge's sentencing discretion is in effect reviewable by pardoning and commutation authorities.

The Government in its case in chief relied exclusively on the corporation's documents and officers. The corporation planned to call some customers, though the method by which they were drawn was not disclosed to the court. This seemed an inadequate survey. So the court asked the parties to take depositions from forty-five customers, selected from a standard directory by taking the first fifteen names under the first, eleventh and twenty-first letters of the alphabet; and the court itself called to the stand the officers of the principal competitor. In the summons the court listed topics appropriate for the questioning of the officers. The actual examination was conducted in turn by the competitor's counsel and the defendant's counsel. Both these types of testimony resulted in giving a much clearer understanding of the total picture of the industries that will be affected by any ultimate decision.

Another problem in the United Shoe case has been to determine what has been the usual methods followed by the defendant in setting prices, in supplying services, and in suing competitors. An adequately grounded conclusion can hardly be based entirely on the plaintiff's selection of a few dramatic incidents and on the defendant's testimony of the general attitude of its officers. The critical point in determining liability and, even more probably, the form of relief, if any, may turn on what has been the typical pattern of the defendant's conduct and the typical effect of that conduct on outsiders. Here the judge can perform a useful function if he, through pretrial conferences or at a later stage of the litigation when he is more aware of its dimensions, provides for appropriate samplings of the conduct and the effects. If the judge is fortunate, the parties may agree on the sampling. But where they do not, it seems to me to be the judge's responsibility first to elicit from witnesses on the stand the criteria necessary to determine what are fair samples and then to direct the parties to prepare such samples for examination and cross-examination. Sampling will make for not merely a more informative but a shorter record--an object to which both bench and bar must give more attention if the judicial process is to survive in antitrust cases.

The question as to what has been the custom of the market and what would be the consequence of a judicial decree altering those practices arises not only in antitrust cases but also when the judge is faced with the problem of determining either the appropriate standard of fair competition in trademarks or the appropriate standard for fiduciaries. Usually, to be sure, diligent counsel offer in evidence enough relevant material. But where this has not been done, there have been times when a judge has tended to reach his result partly on the basis of general information and partly on the basis of his studies in a library.[21] This tendency of a court

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[21] See for example, my own course in National Fruit Product Co.

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to inform itself has increased in recent years following the lead of the Supreme Court of the United States. Not merely in constitutional controversies and in statutory interpretation but also in formulation of judge-made rules of law, the justices have resorted, in footnotes and elsewhere, to references drawn from legislative hearings, studies by executive departments, and scholarly monographs. Such resort is sometimes defended as an extension of Mr. Brandeis' technique as counsel for the state in Muller v. Oregon. In Muller's case, however, Mr. Brandeis' object was to demonstrate that there was a body of informed public opinion which supported the reasonableness of the legislative rule of law. But in the cases of which I am speaking these extra-judicial studies are drawn upon to determine what would be a reasonable judicial rule of law.[22] Thus the focus of the inquiry becomes not what judgment is permissible, but what judgment is sound. And here it seems to me that the judge, before deriving any conclusions from any such extra-judicial document or information, should lay it before the parties for their criticism.

How this criticism should be offered is itself a problem not free from difficulty. In some situations, the better course may be to submit the material for examination, cross-examination and rebuttal evidence. In others, where expert criticism has primarily an argumentative character, it can be received better from the counsel table and from briefs than from the witness box. The important point is that before a judge acts upon a consideration of any kind, he ought to give the parties a chance to meet it. This opportunity is owed as a matter of fairness and also to prevent egregious error. As Professor Long Fuller has observed, the "moral force of a judgment is at maximum if a judge decides solely on the basis of arguments presented to him. Because if he goes beyond these he will lack guidance and may not understand interests that are affected by a decision outside the framework."[23]

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v. Dwinell-Wright Col, 47 F. Supp. 499 (D. Mass. 1942), aff'd, 140 F. 2d 618, 624 (1st Cir. 1944). Despite the affirmance, I now believe my conduct was contrary to the best standards.

[22] It may be needless to emphasize that the problem with which I am concerned is the formulation of a rule of law. Where a court is formulating a finding of fact it, of course, cannot rely on knowledge gained dehors the record, except in so far as it comes within the narrow ambit of the doctrine of judicial notice. Cf. West Ohio Gas Co. v. PUC, 294 U. S. 63, 70 (1935).

[23] FULLER, THE PROBLEMS OF JURISPRUDENCE 707 (temp. ed. 1949). This reasoning may well apply to the appropriate treatment of novel arguments presented to a judge by his law clerk. It may be the responsibility of the judge to present those arguments to counsel for examination. Cf. Experts As Consultants to Courts, 74 N.J.L. J. 52 (1951). This is especially important because of the often

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The duty of the judge to act only upon the basis of material debated in public in no sense implies that the judge's findings should be in the precise terms offered by counsel. Nor does Rule 52(a) of the Federal Rules of Civil Procedure require the judge always to recite all relevant evidence and to rely for persuasive effect exclusively upon mass and orderly arrangement. Yet in corporate cases or other litigation where the issues turn on documentary construction and precise analysis of business details, and where appeal is almost certain to be taken, the trial judge may perform the greatest service by acting almost as a master summarizing evidence for a higher tribunal.[24]

On the other hand, if a judge sitting alone hears a simple tort or contract case falling within a familiar framework and analogous to jury litigation, it is perhaps the best practice for him to state his findings of fact from the bench in those pungent colloquial terms with which the traditional English judge addresses the average man of common sense. When credibility of witnesses is the essence of the controversy, the parties and the lawyers like to have judges act as promptly as juries and, like them, on the basis of fresh impressions.

Where the search for truth is more subtle, the trial court faces the same stylistic challenge as the appellate court. Fortunate are those who like Judge Learned Hand have the gift of many tongues. His admiralty opinions breathe salt air, his commercial cases echo the accents of the market place and his patent rulings reflect an industrial society developed by Yankee ingenuity. Even those whose narrower experience makes them stutter, occasionally strike a subject where they have both the sensitivity and the self-confidence to put the story simply and selectively. But in most cases judges can only try to make their summations of facts as pithy, sympathetic and illuminating as those of Judge Cardozo, even though a study of that master may lead to the conclusion of T. S. Eliot that "the inferiority of common minds to great is more painfully apparent in those modest exercises of the mind in which common sense and sensibility are needed, than in their failure to ascend to the higher flights of genius."

B. Deference to Prior Determinations

While in summarizing the facts trial judges may seek to imitate their superiors on the higher courts, when they wrestle with the substantive law they should not regard themselves as the

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unrecognized importance of those who are associates of the judge in his work. On this point consider the perceptive remark made by Bracton in CONCERNING THE LAWS AND CUSTOMS OF ENGLAND, bk. II, c.16, f. 34 (1969), "qui habet socium, habet magistrum..."

[24] In persuading an appellate tribunal, the virtue of orderli-

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appellate judges writ small. Their freedom is inevitably more narrowly exercised. Most of the time they do not even see the points of difficulty too clearly. With them the pace is quicker, the troublesome issues have not been sorted from those which go by rote, the briefs of counsel have not reached their ultimate perfection. Yet even when he has the clearest perception of the legal issues, certain inhibitions are peculiarly appropriate to restrain a judge who sits alone and subject to review by judges higher in commission.

If the trial judge is presented with the claim that a legislative act is unconstitutional, he ought to remind himself not only of the universal maxim that every possible presumption is in favor of the validity of the legislation but also of the policy represented by those statutes providing that in certain constitutional controversies a district judge has no jurisdiction to act unless he is sitting with two other judges. Though in a constitutional case or any other case he must not surrender his deliberate judgment and automatically accept the views of others, he can ordinarily best fulfill his duty in a constitutional case by explicitly stating for the benefit of an appellate court any doubts he has, without going so far as to enter a decree against a statute which has commanded the assent of a majority of the legislature and, generally, of the executive.

If there is no constitutional question and the trial judge is presented with a judicial precedent or precedents contrary to his own view of what would be the sound rule of law, the problem is more subtle. First, take the situation where the hostile precedents are in the tribunals that sit in review of his own decisions. If the precedents have been so severly impaired by recent cases that it is reasonably clear they no longer represent the present doctrine of the appellate court, the trial judge is generally thought to be free to minimize their directive force, though there is strong opinion to the contrary. Where the precedent has not been impaired, the balance is in favor of the trial judge following it in his decree and respectfully stating in his accompanying opinion such reservations as he has. The entry of the decree preserves that "priority and place" which Shakespeare reminded us were indispensable to justice. Moreover, the reservation in the opinion promotes the

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ness, apart from any other grace, has long been recognized. Cf. Macmillan, Law and Order in LAW AND OTHER THINGS 21, 33 (1937). Simplicity of arrangement has been the only style that I have attempted in summarizing the facts in voluminous records. Standard Oil Co. v. Markham, 64 F. Supp. 656 (S.D.N.Y. 1945), modified and aff'd, 163 F. 2d 917 (2d Cir. 1947); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947 (D. Mass. 1950); Ashley v. Keith Oil Corp., 73 F. Supp. 37 (D. Mass. 1947); Tribble v. J. W. Greer Co., 83 F. Supp. 1015 (D. Mass. 1949).

growth of the law in the court where it most counts. For if the criticism of the precedent be just, the appellate court will set matters straight, and any trial judge worthy of his salt will feel complimented in being reversed on a ground he himself suggested. No trial judge of any sense supposes his quality is measured by a naked tabulation of affirmances and reversals.

Where the hostile precedents come from a judge of equal rank or a court not in the direct line of superior authority, I doubt whether (there should be absolute rules of deference. If the precedent is from a judge sitting in one's own court and represents his mature reflection, the argument in favor of following it rests not only on the appropriate amenities, but also on profounder considerations of equality in the treatment of litigants. But the situation is different where the precedent comes from an inferior court sitting in another geographical area. In the federal system conflict of judgments between the inferior courts is one of the ways that the Supreme Court is led to grant review of legal questions. And the most effective method of getting a significant issue over the Washington threshold is to challenge overtly a court in another circuit.

Another pressing problem of deference has been raised by the spawn of Erie Railroad v. Tompkins. We federal judges are told that in diversity jurisdiction cases our duty is to follow the state law. Most of the time that is readily discoverable. But what are we to do when no state law has been declared or the state law has not been subjected to reconsideration for a generation or more? Take unfair competition cases, at least before the Lanham Act. Until the end of the rule of Swift v. Tyson the state law lay relatively dormant. Most of the important controversies in this field had always been adjudicated in the federal courts and by them according to a general jurisprudence. What happens when these federal cases are not binding authorities? Shall we seek to evolve the state rules exclusively from state precedents, some of which are quite old, and ignore the federal precedents?[25]

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[25] Prior to the enactment of Mass. Ann. Laws c. 110, § 7A (Supp. 1950), the District Court in Massachusetts took a narrow view of the Massachusetts state law of unfair competition. See Triangle Publications, Inc. v. New England Newspaper Pub. Co., 46F. Supp. 198, 203 (D. Mass. 1942); National Fruit Product Co. v. Dwinell-Wright Co., 47 F. Supp. 499, 509 (D. Mass. 1942), aff'd, 140 F.2d 618 (1st Cir. 1944). After the enactment of this statute, the federal cases take a more liberal view of the state law. See Food Fair Stores, Inc. v. Food Fair, Inc., 83F. Supp. 445, 450 (D. Mass. 1948), aff'd, 177 F. 2d 177 (1st Cir. 1949).

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Shall we be equally conservative in corporation cases? A policyholder recently brought a derivative suit in the United States District Court for the District of Massachusetts against an insurance company without first seeking to enlist the aid of his fellow policyholders. The reported Massachusetts cases involved stockholders' suits. None of them was precisely in point. Some of the rulings were not addressed to considerations recently stressed by other courts and by legislatures and administrative agencies. Should the federal court have followed closely what the state had already said, or should it keep one eye on the national trend? Consider also the case of a stockholder seeking to procure an equity receivership for the purpose of liquidating a corporation. The only Massachusetts decisions are old and negative. The modern trend is favorable. Shall the federal court assume that the Massachusetts state court will follow its predecessors or its contemporaries?

The impressions that I gather from the cases is that a federal judge sitting in a diversity jurisdiction case is less willing to depart from obsolete doctrines than when he sits in a purely federal case. And this reluctance is not apt to be modified by the action of his superiors in the federal courts. On questions of state law federal appellate courts repeatedly state their reliance on the knowledge possessed by federal trial judges sitting in the locality. Thus the total tendency of the *Erie Railroad* doctrine has a strong reactionary direction which it is hard to believe its proponents and expansionists appreciated. Perhaps, indeed, this is part of a larger problem of the twentieth century judicial emphasis on conflict of laws. Every time judges are called upon to apply the law of a foreign jurisdiction, are they not inclined to give undue weight to the recorded landmarks and to underestimate the mobile qualities and the thrusts of principle we discern in our domestic law?

C. Cases of First Impression

From the discussion above it may appear that the trial judge almost never sees a problem of first impression. Of course, his percentage of novel cases is much smaller than that of the appellate judge. But they do come. Indeed, the percentage and type of novel cases may depend on the judge's own interests and his alertness to emphasize novel points not fully appreciated by counsel. Did MacPherson v. Buick Motor Co.,[26] *Glanzer v. Shepard*, and *Palsgraf v. Long Island R.R.* come to Judge Cardozo with what we now regard as their distinctive significance already marked--or was Judge Cardozo prepared by prior study and reflection to look for possibilities of extending the law of negligence? Is it not true of original judges as of original scientists that "success comes to the prepared mind," to use Pasteur's phrase?

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[26] 217 N. Y. 382, III N.E. 1050 (1916). I have been authorita-

If the answer is in the affirmative, then the bar may be following the wrong track in its recent insistence on the isolation of the judiciary from all tasks except those of hearing and deciding cases in court. Some judges, like Cardozo, have their horizons widened and their interests stimulated by studying, lecturing and writing. Other judges, without becoming enmeshed in public controversy, may by occasional service on commissions of inquiry be led to such a fresh understanding of this dynamic world that they will bring novel or profounder insights to their judicial tasks.

III. The Trial Judge's Contribution To Law

Before I conclude, it may be well to tackle a question which might have been asked at the outset. Are the usages followed by trial judges anything more than patterns of behavior? Are they law in any sense? And even if they are law, are they too disparate and detailed ever to have an honored place in the study of jurisprudence?

Concede that the normative practices which have here been reviewed fall far short of the Austinian command of the sovereign. For a judge who chooses to depart from these particular standards does not lay himself open to reversal by courts of superior authority. And yet that which is generally approved as being good and being within the reach of average men does in time become law in the strictest sense. This is how the law of ficuciaries and the law merchant have grown. And the principle applies in equal measure to the law governing trial judges. What is the whole law of procedure[27] but the crystallization of judicial custom? The trial judges made the law of evidence by their usages; and perhaps now they are remaking it. This alteration is hidden by appellate courts which treat departures from the proclaimed evidentiary rules not as though they represented new doctrine, but as though they were insignificant nonreversible errors. What are the rules governing measure of proof? Today it is said that there exist in the federal courts only two standards: the criminal standard of proof

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tively told that this case was initially assigned by the Chief Judge of the Court of Appeals to a judge who did not see the possibilities of evolving a new rule of law.

[27] Cohen, The Process of Judicial Legislation in LAW AND THE SOCIAL ORDER 112, 128 (1933):

It is characteristic of the prevailing rationalistic systems of legal philosophy that they minimize the importance of procedure by calling it adjective law, etc. But the tendency of all modern scientific and philosophic thought is to weaken the distinction between beyond a reasonable doubt and the civil standard of the preponderance of the evidence. And yet already in some special classes of cases where fraud is the central issued, there seems to be emerging an intermediate rule, the requirement reflects the unspoken practice of trial courts to move with extreme caution in fastening a finding of immoral conduct upon a party litigant. What shall be said of remedies which trial judges have newly evolved in equitable suits founded on statues? Novel remedies begin as permissible exercises of discretion by the court of first instance.[28] They win approval and imitation by other similarly circumstanced courts. And in the end what was discretionary has become mandatory.[29] Here is the common law at work[30]-- a progressive contribution by the judges, trial as well as appellate; perhaps less important today than formerly, and always less important than the additions made by legislative bodies; but more clearly ethical in its nature because the consent on which it rests has undergone a longer, more intimate, more pragmatic test.

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substance and attribute...and to emphasize the importance of method, process, or procedure.

[28] Cohen, Rule Versus Discretion in LAW AND THE SOCIAL ORDER 264 (1933): Discretion, in general, represents more or less instinctive evaluation or appreciation of the diverse elements that enter into a complex; and such instinctive evaluation must precede conscious rule-making.

[29] This progression can be neatly traced in the labor field by studying the development of remedies originally prescribed by Hutcheson, J., in Brotherhood of Ry. and S.S. Clerks v. Texas & N.O.R., 24 F.2d 426, 434 (S.D. Tex.), injunction made permanent, 25F. 2d 873, 876 (S.D. Tex. 1928), aff'd, 33 F. 2d 13 (5th Cir. 1929) aff'd, 281 U.S. 548 (1930), and later embodied in the Railway Labor Act and the National Labor Act and the National Labor Relations Act. Or consider the types of remedies in antitrust cases. Compare Hartford-Empire Co. v. United States 323 U.S. 386, modified, 324 U.S. 570 (1945), with United States

[30] The common law historically is founded on remedies. Cf. 2 MAITLAND, COLLECTED PAPERS 110 (Fisher ed. 1911): "Legal Remedies, Legal Procedure, these are the all-important topics for the student." No doubt most

It should not be supposed that because his jurisdiction is limited, because so much of his work goes unreported, because he is immersed in the detail of fact, the trial judge is clothed with small responsibility in relating law to justice. It is he who makes the law become a living teacher as he transmits it from the legislature and the appellate court to the citizen who stands before him. It is he who watches the impact of the formal rule, explains its purpose to layment and seeks to make its application conform to the durable and reasonable expections of his community.[31] It is he who determines whether the processes of common law growth shall decay or flower with a new vigor.

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litigants would agree that they too regard the remedy as the all-important topic. And so would many jurists. See citations by Frank, J., in United States v. Obermeier, 186 F. 2d 243, 255, n. 52 (2d Cir. 1950).

[31] Rheinstein, Who Watches The Watchmen? in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 589, 602 (Sayre ed. 1947):

The judicial process is not an automatic one,...it c contains an inevitable element of creative activity.. It is...(the) articulation of a pre-existing standard, a standard pre-existing in the unexpressed and inarticulated value consciousness of the community.

IV. THE LEGAL PROCESS AND PROBLEMS IN URBAN HOUSING

A. The Dimensions of the Urban Housing Problem.

Housing in a slum is the most obvious physical dimension of the problems of urban low income people. Approximately 4 million urban families lived in substandard housing in 1967 and the number of housing units that fall below the line of human habitability grows larger every year. The problems of finding decent housing for families with low incomes has been further complicated by urban renewal programs and highway construction programs which have eliminated thousands of housing units, causing even more critical overcrowding of the housing market.

In an informal sense, substandard housing is simply that which is clearly not fit for human habitation. It is housing which is overcrowded, underheated, lacking in proper sanitation facilities, without clean and safe public ways. It is that housing which numbers rats and varmin among its inhabitants, and leadbased paint, exposed wiring and stopped up toilets as interior decor. The toll which housing of this type extracts from the physical health of its occupants is beginning to be reported in medical journals and newspapers. The emotional stress which living under less than human physical surroundings causes may never be known.

Formally, substandard housing is defined by the housing code of the city. The housing codes are usually in two parts. One part governs the building of new housing. It details types of construction materials, standards of workmanship that must be maintained. The second part of the housing code deals with standards of sanitation and maintenance which must be maintained in housing already existent. Such factors as heating, the care of the public halls and stairways and the number of persons per dwelling unit are used to define standard housing. However, for a long series of reasons (all of them unimportant to a tenant in a substandard dwelling) these laws have until recently had little effect upon the life of the low income urban citizen.

Perhaps the single most important fact that must be recognized before any thinking about urban housing can be done, is that almost all of the housing that makes up the "problem" is rental housing. The framework within which one must operate in solving individual or group housing crises, or in doing planning for the future or understanding the past is one of landlord-tenant relationships. In general, the people who own slum housing do not live in it.[1]

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[1] Those buildings in which there are owner occupants are better cared for and more responsive to tenant problems.

The emphasis in the last few years has changed in urban areas from destruction of substandard dwellings to rehabilitation. There are both economic, and socio-political reasons for this change. First, it costs less to repair and refurnish buildings already standing than to build new ones. Secondly, keeping as many buildings as possible fit for occupancy avoids disruption of neighborhoods, relocation of low income tenants and further concentration of low rental areas. The need is for more housing not more vacant lots, shopping centers or even highways. City residents are fighting with more vigor every day to resist being dehoused with some vague promises of relocation.

The following portion of the "Report of the National Advisory Commission on Civil Disorders," gives a statistical indication of the part of the low income population that is Black.

HOUSING (pp. 467-474)

The passage of the National Housing Act in 1934 signalled a new federal commitment to provide housing for the nation's citizens. Fifteen years later Congress made the commitment explicit in the Housing Act of 1949, establishing as a national goal, the realization of "a decent home and suitable environment for every American family."

Today, after more than three decades of fragmented and grossly under-funded federal housing programs, decent housing remains a chronic problem for the disadvantaged urban household. Fifty-six percent of the country's non-white families live in central cities today, and of these, nearly two-thirds live in neighborhoods marked by substandard housing and general urban blight. For these citizens condemned by segregation and poverty to live in the decaying slums of our central cities, the goal of a decent home and suitable environment is as far distant as ever.

The Department of Housing and Urban Development classifies substandard housing as that housing reported by the United States Census Bureau as (1) sound but lacking full plumbing, (2) deteriorating and lacking full plumbing, or (3) dilapidated.

During the decade of the 1950's, when vast numbers of Negroes were migrating to the cities, only 4 million of the 16.8 million new housing units constructed throughout the nation were built in the central cities. These additions were counterbalanced by the loss of 1.5 million central-city units through demolition and other means. The result was that the number of nonwhites, living in substandard housing increased from 1.4 1.8 million, even though the number of substandard whites declined.

Statistics available for the period since 1960 indicate that the trend is continuing. There has been virtually no decline in the number of occupied dilapidated units in metropolitan areas, and surveys in New York City and Watts actually show an increase in the number of such units. These statistics have led the Department of Housing and Urban Development to conclude that while the trend in the country as a whole is toward less substandard housing, "There are individual neighborhoods and areas within many cities where the housing situation continues to deterioate."

Inadequate housing is not limited to Negroes. Even in the central cities the problem affects two and a half times as many white as nonwhite households. Nationally, over 4 million of the nearly 6 million occupied substandard units in 1966 were occupied by whites.

It is also true that Negro housing in large cities is significantly better than that in most rural areas--especially in the South. Good quality housing has become available to Negro city dwellers at an increasing rate since the mid-1950's when the postwar housing shortage ended in most metropolitan areas.

Nevertheless, in the Negro ghetto, grossly inadequate housing continues to be a critical problem.

Hearings before the Subcommittee on Executive Reorganization of the Committee on Government Operations, United States Senate, 89th Congress, 2nd session, August 16, 1966, p. 148.

Substandard, Old and Overcrowded Structures.

Nationwide, 25 percent of all nonwhites living in central cities occupied substandard units in 1960 compared to 8 percent of all whites. Preliminary Census Bureau data indicate that by 1966, the figures had dropped to 16 and 5 percent respectively. However, if "deteriorating" units and units with serious housing code violations are added, the percentage of nonwhites living in inadequate housing in 1966 becomes much greater.

In 14 of the largest U. S. cities, the proportions of all nonwhite housing units classified as deteriorating, dilapidated, or lacking full plumbing in 1960 (the latest date for which figures are available), were as follows:

City	Percentage of Nonwhite Occupied Housing Units Classified Deteriorating or Dilapidated 1960	Percentage of Nonwhite Occupied Housing Units Classified Deteriorating, Dilapidated, or Sound but without Full Plumbing, 1960
New York	33.8%	42.4%
Chicago	32.1%	42.8%
Los Angeles	14.7%	18.1%
Philadelphia	28.6%	32.0%
Detroit	27.9%	30.1%
Baltimore	30.5%	31.7%
Houston	30.1%	36.7%
Cleveland	29.9%	33.9%
Washington, D. C.	15.2%	20.8%

St. Louis	40.3%	51.6%
San Francisco	21.3%	34.0%
Dallas	41.3%	45.9%
New Orleans	44.3%	56.9%
Pittsburgh	49.1%	58.9%

Source: U. S. Department of Commerce Bureau of the Census

Conditions were far worse than these city-wide averages in many specific disadvantaged neighborhoods. For example, a study of housing in Newark, New Jersey, before the 1967 disorders, showed the following situation in certain predominantly Negro neighborhoods as of 1960:

Percentage of Housing Units Dilapidated or
Deteriorated in Selected Areas of Newark, 1960

Area Number	Population	Percentage Nonwhite	Percentage of All Housing Units Dilapidated or Deteriorating
1	25,300	75.5%	91.0%
2	48,200	64.5%	63.8%
3A	48,300	74.8%	43.1%

These three areas contained 30 percent of the total population of Newark in 1960, and 62 percent of its nonwhite population.

The Commission carried out special analyses of 1960 Housing conditions in three cities, concentrating on all Census Tracts with 1960 median incomes of under $3,000 for both families and individuals. It also analyzed housing conditions in Watts. The results showed that the vast majority of people living in the poorest areas of these cities were Negroes, and that a high proportion lived in inadequate housing:

Item	Detroit	Washington D.C.	Memphis	Watts Area of Los Angeles
Total population of study area	162,375	97,084	150,827	49,074
Percentage of study area nonwhite	67.5%	74.5%	74.0%	87.3%
Percentage of Housing Units in study area:				
--Substandard by HUD definition	32.7%	23.9%	35.0%	10.5%
--Dilapidated, deteriorating or sound but lacking full plumbing	53.1%	37.3%	46.5%	29.1%

Source: U. S. Department of Commerce, Bureau of Census

Negroes, on the average, also occupy much older housing than whites. In each of ten metropolitan areas analyzed by the Commission, substantially higher percentages of nonwhites than whites occupied units built prior to 1939.

Percentage of White and Nonwhite Occupied Housing Units
Built Prior to 1939 in Selected Metropolitan Areas

Metropolitan Area	White Occupied Units	Nonwhite Occupied Units
Cleveland	33.2	90.6
Dallas	31.9	52.7
Detroit	46.2	86.1
Kansas City	54.4	89.9
Los Angeles--Long Beach	36.6	62.4
New Orleans	52.9	62.2
Philadelphia	62.0	90.8
Saint Louis	57.9	84.7
San Francisco--Oakland	51.3	67.6
Washington, D. C.	31.9	64.9

Source: U. S. Department of Commerce Bureau of the Census

Finally, Negro housing units are far more likely to be overcrowded than those occupied by whites. In U. S. metropolitan areas in 1960, 25 percent of all nonwhite units were overcrowded by the standard measure (that is, they contained 1.01 or more persons per room). Only 8 percent of all white--occupied units were in this category. Moreover, 11 percent of all nonwhite-occupied units were seriously overcrowded (1.51 or more persons per room), compared with 2 percent for white-occupied units. The figures were as follows in the ten metropolitan areas analyzed by the Commission.

Percentage of White and Nonwhite Occupied Units With 1.01
or More persons Per Room in Selected Metropolitan Areas

Metropolitan Area	White Occupied Units	Nonwhite Occupied Units
Cleveland	6.9	19.3
Dallas	9.3	28.8
Detroit	8.6	17.5
Kansas City	8.7	18.0
Los Angeles--Long Beach	8.0	17.4
New Orleans	12.0	36.1
Philadelphia	4.9	16.3
Saint Louis	11.8	28.0
San Francisco--Oakland	6.0	19.7
Washington, D. C.	6.2	22.6

Source: U. S. Department of Commerce Bureau of the Census

Higher Rents for Poorer Housing

Negroes in large cities are often forced to pay the same rents as whites and receive less for their money, or pay higher rents for the same accommodations.

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The first type of discriminatory effect--paying the same amount but receiving less-is illustrated by data from the 1960 Census for Chicago and Detroit.

In certain Chicago census tracts, both whites and nonwhites paid median rents of $88, and the proportions paying various specific rents below that median were almost identical. But the units rented by nonwhites were typically:

--Smaller (the median number of rooms was 3.35 for nonwhites versus 3.95 for whites).
--In worse condition (30.7 percent of all nonwhite units were deteriorated or dilapidated units versus 11.6 percent for whites).
--Occupied by more people (the median household size was 3.53 for nonwhites versus 2.88 for whites).
--More likely to be overcrowded (27.4 percent of nonwhite units had 1.01 or more persons per room versus 7.9 percent for whites).

In Detroit, whites paid a median rental of $77 as compared to $76 among nonwhites. Yet 27.0 percent of nonwhite units were deteriorating or dilapidated, as compared to only 10.3 percent of all white units.

The second type of discriminatory effect--paying more for similar housing--is illustrated by data from a study of housing conditions in disadvantaged neighborhoods in Newark, New Jersey. In four areas of that city (including the three areas cited previously), nonwhites with housing essentially similar to that of whites paid rents that were from 8.1 percent to 16.8 percent higher. Though the typically larger size of nonwhite households, with consequent harder wear and tear, may partially justify the difference in rental, the study found that nonwhites were paying a definite "color tax" of apparently well over 10 percent on housing. This condition prevails in most racial ghettos.

The combination of high rents and low incomes forces many Negroes to pay an excessively high proportion of their income for housing. This is shown dramatically by the following chart, showing the percentage of renter households paying over 35 percent of their incomes for rent in ten metropolitan areas:

Percentages of White and Nonwhite Occupied Units With Households Paying 35 Percent or More of Their Income For Rent in Selected Metropolitan Areas

Metropolitan Area	White Occupied Units	Nonwhite Occupied Units
Cleveland	8.6	33.8
Dallas	19.2	33.8
Detroit	21.2	40.5
Kansas City	20.2	40.0
Los Angeles--Long Beach	23.4	28.4
New Orleans	16.6	30.5
Philadelphia	19.3	32.1

Saint Louis	18.5	36.7
San Francisco--Oakland	21.2	25.1
Washington, D. C.	18.5	28.3

Source: U. S. Department of Commerce Bureau of the Census

The high proportion of income that must go for rent leaves less money in such households for other expenses. Undoubtedly, this hardship is a major reason many Negro households regard housing as one of their worst problems.

Discrimination in Housing Code Enforcement

Thousands of landlords in disadvantaged neighborhoods openly violate building codes with impunity, thereby providing a constant demonstration of flagrant discrimination by legal authorities. A high proportion of residential and other structures contain numerous violations of building and housing codes. Refusal to remedy these violations is a criminal offense, one which can have grievous effects upon the victims--the tenants living in these structures. Yet in most cities, few building code violations in these areas are ever corrected, even when tenants complain directly to municipal building departments.

There are economic reasons why these codes are not rigorously enforced. Bringing many old structures up to code standards and maintaining them at that level often would require owners to raise rents far above the ability of local residents to pay. In New York City, rigorous code enforcement has already caused owners to board up and abandon over 2,500 buildings rather than incur the expense of repairing them. Nevertheless, open violation of codes is a constant source of distress to low income tenants and creates serious hazards to health and safety in disadvantaged neighborhoods.

Housing Conditions and Disorder

Housing conditions in the disorder cities surveyed by the Commission paralled those for ghetto Negroes generally.

Many homes were physically inadequate. Forty-seven percent of the units occupied by nonwhites in the disturbance areas were substandard.

Overcrowding was common. In the metropolitan areas in which disorders occurred, 24 percent of all units occupied by nonwhites were overcrowded, against only 8.8 percent of the white-occupied units.

Negroes paid higher percentages of their income for rent than whites. In both the disturbance areas and the greater metropolitan areas of which they were a part, the median rent as a proportion of median income was over 25 percent higher for nonwhites than for whites.

The result has been widespread discontent with housing conditions and costs. In nearly every disorder city surveyed, grievances related to housing were important factors in the structure of Negro discontent.

Poverty and Housing Deterioration

The reasons many Negroes live in decaying slums are not difficult to discover. First and foremost is poverty. Most ghetto residents cannot pay the rent necessary to support decent housing. This prevents private builders from constructing new units in the ghettos or from rehabilitating old ones, for either higher rents than most ghetto dwellers can pay. It also deters landlords from maintaining units that are presently structurally sound. Maintenance requires additional investment, and at the minimal rents that inner-city Negroes can pay, landlords have little incentive to provide it.

The implications of widespread poor maintenance are serious. Most of the gains in Negro housing have occurred through the turnover which occurs as part of the "filtering down" process--as the white middle class moves out, the units it leaves are occupied by Negroes. Many of these units are very old. Without proper maintenance, they soon become dilapidated, so that the improvement in housing resulting from the filtering-down process is only temporary. The 1965 New York City survey points up the danger. During the period that the number of substandard units was decreasing, the number of deteriorating units increased by 95,000.

Discrimination

The second major factor condemning vast numbers of Negroes to urban slums is racial discrimination in the housing market. Discrimination prevents access to many nonslum areas, particularly the suburbs, and has a detrimental effect on ghetto housing itself. By restricting the area open to a growing population, housing discrimination makes it profitable for landlords to break up ghetto apartments for denser occupancy, hastening housing deterioration. By creating a "back pressure" in the racial ghettos, discrimination keeps prices and rents of older, more deteriorated housing in the ghetto higher than they would be in a truly free and open market.

Existing Programs

To date, federal building programs have been able to do comparatively little to provide housing for the disadvantaged. In the 31-year history of subsidized federal housing, only about 800,000 units have been constructed, with recent production averaging about 50,000 units a year. By comparison, over a period only three years longer, FHA insurance guarantees have made possible the construction of over ten million middle and upper-income units.

Federal programs also have done little to prevent the growth of racially segregated suburbs around our cities. Until 1949, FHA official policy was to refuse to insure any unsegregated housing. It was not until the issuance of Executive Order 11063 in 1962 that the Agency required nondiscrimination pledges from loan applicants.

It is only within the last few years that a range of programs has been created that appears to have the potential for substantially relieving the urban housing problem. Direct federal expenditures for housing and community development have increased from $600 million in a fiscal 1964 to nearly $3 billion in fiscal 1969. To produce significant results, however, these programs must be employed on a much larger scale than they have been so far. In some cases the constraints and limitations imposed upon the programs must be reduced. In a few instances supplementary programs should be created. In all cases, incentives must be provided to induce maximum participation by private enterprise in supplying energy, imagination, capital and production capabilities.

Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them. This can only continue to compound the conditions of failure and hopelessness which lead to crime, civil disorder and social disorganization.

B. Who are the Parties in the Housing Situation.

In the average urban housing problem there are four probable parties: the tenant, the landlord, the landlord's agent and the city officials. If the tenant is a welfare recipient, the welfare department may also be involved. The basic rights and responsibilities of these parties as they now exist and their possible future rules are at the basis of any understanding of the problems faced by the city dweller.

The Tenant is the person or persons living on the premises. By definition he does not own his dwelling place, but rents it from the owner for a specific person of time. Although all of the persons living in the dwelling may be called tenants, the legally responsible tenant is generally the person who signs or orally commits himself to the lease.

The Landlord is the person who owns the property. He is the person whose name appears on the papers showing ownership. He is ultimately responsible for the sale of the building, its compliance with the law covering buildings of its type, and obligations imposed by the lease. The title landlord also indicates that the use of the property has in some form been given to someone else in return for some form of payment to the owner. If the owner of the property was also its only occupant then he would simply be called the owner or the property owner.

The Agent is the person with whom most urban tenants do business. Most landlords do not live in the buildings which they rent to others. Many landlords own more than one building. Those two factors among others make it common practice for the owner of the building to designate someone else to take over many of his obligations to and powers over the tenant. That designee is the agent. The agent may be the employee of a real estate company retained by the landlord or an employee of the landlord himself. He may even live in the building and perform certain maintenance functions himself. In either case, the agent generally has the power to show the landlord's property to a prospective tenant, to make an offer of terms for its rental, to accept the tenant's agreement to rent, to collect the rental on a regular basis and to designate someone to perform the services required by law and by the rental agreement. The landlord is generally legally liable, that is held responsible by a court, for the actions of the agent undertaken in the course of his regular employment.

The City Officials most often concerned with housing problems are those charged with maintaining housing standards. Most cites have offices of housing inspection, or housing code enforcement. These people have the right and responsibility to investigate complaints of violations of the housing code. They then have the right and responsibility of contacting the officials in the city charged with enforcement. City officials have the responsibility and the right to investigate complaints of violations of the housing code. If they find violations, they then have the responsibility of contacting the officials in the city charged with enforcement. Initially this may mean some sort of administrative warning from the housing department, ultimately it may mean prosecution by the city attorney's office.

C. The Lease.

The agreement by which the landlord gives the tenant the right to reside in the dwelling which he owns, and by which the tenant agrees to give the landlord something of value in return for that right is known as the lease. Leases while they sound very much like any contract for goods and services are usually not treated with the same set of laws which govern sales transactions for example. The rights of the parties to a lease are determined by a special area of law, judicial and statutory, called land-lord tenant law. Primary to the understanding of contemporary housing problems and their solutions is the understanding that the law of landlord and tenant has been firmly rooted in the medieval relationship of the agrarian tenant and his landlord. Much of the laws reckoning of the rights and responsibilities of both parties in a rental agreement have, until very recently, been based upon the idea that the tenant was in full control of the property as was a tenant on the land of England hundreds of years ago, and upon agrarian notions of occupation and ownership and use of property. That is why most of the cases in this section, while they seem quite reasonable in the contemporary urban contest, are in fact brand new approaches to the problems in the field of housing.

The lease is the agreement, which indicates exactly what premises are to be rented, what the rental period will be, what the landlord is responsible for doing for the tenant, the tenants responsibilities in maintaining the property, the amount or kind of rental to the paid, and when it falls due.

There are two kinds of leases used in the rental of urban housing, oral leases and written leases. The use of written leases, setting out all rights and responsibilities of the landlord and the tenant is largely confined to the rental of upper and middle class housing, or public housing. The mass of low income urban tenants make their agreement with the landlord simply through the spoken word.

Written leases, in urban areas tend to be standard forms with little or no room for deviation in the agreement. A frequent illusion relied on by the courts in housing cases (as well as in consumer credit cases), is that both parties are free agents in the drafting of the lease agreement. This is rarely true. The tenant's choice is of taking or leaving the lease as it stands and not of modifying its terms. In most urban areas there is a standard form lease for multiple family dwellings which is usually landlord oriented, written and distributed by the local real estate agents organization and used almost exclusively by every landlord in the area.

D. Legal Theories, Historical Roots, and Practical Problems

The following article suggests the historical background of the landlord-tenant law as applied to the urban situation and some of the ways to cast off the old and find a new way to deal with the urban rental situation in a manner that is fair to both landlords and tenants and accomplishes some broader housing goals of the cities.

PRINCIPLES FOR THE SOLUTION OF LANDLORD-TENANT PROBLEMS*

John H Schlegal

The attached landlord-tenant bill is a direct attack on the two major problems in the rental housing market the lack of an adequate quantity of standard housing, and the inadequacy of tradiational landlord-tenant law to meet the problems posed by the need to house the predominantly urban population that has been a deminant feature of life in Illinois at least since the 1930's. These are not just the problems of the urban poor. The prevalence of substandare housing is a critical problem in predominantly rural areas, as well as urban areas. The inadequacy of traditional landlord-tenant law affects all urban residents, rich or poor.

The substantial deficit in adequate, livable, low and moderate income housing needs no comment; the inadequacy of traditional landlord-tenant law perhaps does. English land law of the Eighteenth Century, our landlord-tenant law today, not surprisingly, is out of joint with the times. It has little or nothing of relevance to offer for solving the problems of housing an urban population because it is designed for a predominantly agricultural society in which the condition of the residential premises is a secondary concern and maintenance by the owner is an unrealistic rule since the tenant is both closer to the problems and better equipped to handle them without interfering with other people. Likewise, that body of law assumes a relatively free market with some surplus productive capacity, not a market in which there is a substantial deficit in adequate housing for substantial segments of the population. To some extent this inadequacy has contributed to the lack of adequate housing. Significantly, the country of origin has all but abolished landlord-tenant law as we know it with respect to residential property.

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*This is an excerpt from an unpublished response to the American Bar Foundation's Model Landlord-Tenant Code. It is reprinted with permission of the author.

These two problems are substantial ones; the response made by this draft bill is equally substantial. We propose a major overhaul of landlord-tenant law as it is known today, and replacement with a body of law designed to meet the problems faced today. Our solutions proceed from an interrelated group of observations which reflect the interrelationships in the problems.

Solutions to problems of the lack of an adequate quantity of standard housing have to begin with the recognition that it is highly unlikely that there will be any great influx of money into the construction of new low and moderate income housing in the near, or medium, future. Returns are not high enough to compete effectively in the private capital market and substantial government assistance of the necessary order of magnitude is simply not to be forthcoming, and may not even be desirable. The problem is too critical today to wait for solution in the far future. Thus, the only approach toward substantially improving the quality of housing now is to direct rentals, the one available source of funds, into the improvement of sound, existing structures. Similarly, rents are the only available source of funds to prevent deterioration of presently standard housing.

Landlords often object that the existence of so much substandard housing is due to the lack of tenant interest in the upkeep of an apartment. The objection is not wholly unreasonable. It reflects a real failure in the legal system. The tenant takes no interest in his premises since the law in operation, whatever its intent, neither serves his needs, nor gives him a degree of control over, or responsibility for, his dwelling. The low and moderate income tenant first needs security. This need is easy to understand. But the result of a lack of security is seldom mentioned: Without security a tenant has no particular reason to care about damage to his dwelling, for he may be gone tomorrow. Secondly the low and moderate income tenant needs some degree of mobility. This need comes from the problem of transportation in an urban society; the worker has to follow the best available job. The typical tenancy in low and moderate income housing is month-to-month or week-to-week. This offers great mobility but absolutely no security, for the tenant knows that under a periodic tenancy in a housing deficit market, he will be without a roof if he begins to complain about the condition of the dwelling unit. And, of course, he has no "rights," except to put his limited resources into a dwelling he may not occupy next month. Even his mobility is no great boon, if, as is the case, the market is segregated racially and economically, and discriminates against families with children and families on public aid. Mobility isn't much if there is no place to go.

The middle and upper income tenant does gain the security the low income tenant lacks; he is forced into executing a lease. This document, which according to theory should take care of all the problems in a periodic tenancy, in fact serves only to limit the landlord's liability, and decrease the range of permissible use of the premises. Bargaining over its terms is normally out of the question, and the best that can ever be worked out is maybe a little decorating. Mobility, probably equally important to middle and upper income tenants, is restricted with little, if anything, gained in return. And the relative surplus of middle and upper income housing severely limits any impetus for this tenant to use his more extensive resources to halt deterioration. Instead, he moves away.

Previous expressions of governmental interest in these problems have generally ignored the basic inadequacies in landlord-tenant law, and concentrated on an attempt to provide adequate housing for all citizens. This effort has generally been in the form of housing code enforcement by local governmental authorities, although some direct financing, urban renewal efforts have been made. This is a very poor solution for a problem of this magnitude. Government enforcement of housing standards does nothing toward increasing tenant interest in his housing. Indeed, it may even decrease tenant interest. Moreover, what is enforced is unfortunately generally irrelevant to the problem.

Building codes are often designed as protection for the construction trades. They promote repair, not rehabilitation, of a structure, and thus, do not direct more than an absolute minimum amount of capital into existing structures. Even worse, the quasi-criminal nature of enforcement is inappropriate and leads in practice to informal, delayed resolution of problems in which the tenant, whose interests are being protected, gets lost in the shuffle. Lastly, few governments have funds enough to pay for a really adequate enforcement program, and those funds available are, not unreasonably, channeled into policing new construction.

To date everyone seems to have forgotten that the person with the greatest reason to carefully oversee the condition of housing is the tenant of that housing, not the landlord, or the government. But, before a tenant will take an interest in his housing, he must be able to obtain housing on terms that satisfy his need for security and, if possible, mobility, and give him some degree of control over, and responsibility for the condition of the property. Thus, the law of landlord and tenant must be revised to alter the basic notion of tenancy and to create tenant rights and responsibilities.

On the basis of the observations detailed above, the best way to solve the two problems in housing today is to start from scratch and build a system of landlord tenant law based on readily enforceable obligations placed on both the landlord and the tenant which are dependent in carefully controlled ways, and which have the effect of channeling rent into repair and maintenance of the residential dwelling. The same observations were responsible for eschewing the two most common approaches to these problems. A solution based on a little more money for code enforcement, and a few statutory additions- a stronger retaliatory eviction section, and a covenant of habitability, for example - is unwise because it fails to see the enormity of the problem, ignores the failure of landlord tenant law to change with the times, and underestimates the amount of money needed to do the job. Likewise, another common solution based on creating a landlord's duty of repair, giving the tenant a right to withhold rent if repairs are not made, and making all covenants dependent, is inadequate because although it starts at a basic revision of landlord-tenant law, it is not thorough-going enough and is in fact irresponsible since, in the face of a lack of available resources, it allows rentals to be simply dissipated.

The solution proposed is not an easy political solution to the problem, but the problem is not an easy political one. The housing situation is critical, so critical that compromise legislation ia not a reasonalbe alternative. Legislation which sounds revolutionary but in fact delivers nothing significant in terms of tenant rights and remedies is worse than none at all. None at all would be a tragic mistake. In this national problem Illinois can, and should develop the solution.

E. Methods.

In the cases, statutes and problem that follow, take a three step approach to analysis. First figure out who the parties in the case are. Secondly, determine what points are at issue, and how the court or the brief resolves those points. Finally, attempt to make some sort of statement of the general rule of law that is applied by the judge, suggested by the statute or that would solve the problem. Be sure to think of each case in terms of the responsibilities of all parties and the goals of the city as a whole, as well of the interests of the particular parties that are involved.

II. The landlord's Actions Against the Tenant.

A. Eviction.

The principle way in which landlords take action against tenants is eviction. Eviction is the process of the law by which the landlord effectively moves the tenant off of the property. While most people think of eviction as something that the landlord does, it is important to remember that in fact it is some agent of the legal process who actually accomplishes the removal of the tenant. The landlord simply initiates the procedure. If the landlord enters a tenant's apartment and throws him out or demands that he leaves immediately, that is not a classical eviction for the legal process has not been involved. This involvement of the legal system is very important, for the same system offers the tenants various ways to delay actually moving and to defend entirely against the landlord's action.

The object of an eviction is only to remove the tenant from the landlord's property. An eviction action does not address itself to back rent or to redress for damages to the landlord's property.

In most states the process of eviction is governed by state statutes. The following materials taken from the Reginald Heber Smith Fellowship materials of the University of Pennsylvania give a general outline of the statutory framework of the eviction procedure.

SUMMARY EVICTION PROCEEDINGS

Introduction

Most states have some form of special proceeding by which a landlord can obtain a warrant of eviction enforceable by a court officer in a short period of time from a court, usually of limited jurisdiction (e.g., a municipal court). Some states passed a special statute for this purpose, while others simply amended their old statute of Forcible Eviction and Detainer and, in these states, the action is commonly called by that name. The process is swift: typically statute or court rules provide a three-day minimum period between service of process and the court hearing, though often, however, the court will hear landlord-tenant cases on only certain days of the week and the delay involved in scheduling may increase the time gap. If the landlord wins at the hearing, the eviction papers are given to a court officer (constable, sergeant-at-arms, sheriff) who is authorized to evict the tenant and his possessions, physically if necessary. Normally there is a few days' delay between the judgment and the time that the papers are served on the tenant. These officers generally prefer not to use force and, depending on locality, will often permit a further short delay if the tenant offers to move voluntarily. If all goes smoothly for the landlord, and the tenant does not defend, the tenant will usually be out of possession in about two to three weeks from the service of process. The length of time depends on such variables as the jurisdiction, the locality, the preserverence of the landlord and his attorney, if he has one. If all goes smoothly for the landlord, and the tenant does not defend, the tenant may be put out of possession anywhere from two to four weeks minimum from the service of process. A recent survey in Camden County, New Jersey disclosed that the average time for residential evictions was 44 days.

Landlord's Causes of Action.

The two main causes of action are default in rent and termination of a periodic tenancy. By statute or case law the court often has jurisdiction to entertain the landlord's suit where the cause of action is tenant's willful damage to the premises, continuous violation of the rules of the tenancy, disturbance of the other tenants, or (if there is a written lease) breach of a covenant for which a right of re-entry is reserved. These other basis of suit are not explicitly involved in most summary eviction cases although they are often implicitly present. For example, other tenants may be complaining about the defendant tenant's conduct, but not want to testify as to this, and the landlord suspects, but cannot prove that defendant's twelve-year old son is the one who has been smashing beer bottles in the halls. Because an eviction on these grounds may present problems, the landlord instead terminates the periodic tenancy and proceeds after a month's delay on that basis. These other causes of action may become more important when the defense of "retaliatory" eviction (discussed in full later) becomes widely recognized. Here the landlord seeks to evict a tenant, who is paying rent, by terminating the tenancy because the tenant complained to the housing code authorities. If this motive can be demonstrated, and a defense upheld, the landlord may attempt to justify the evict on one of the other bases mentioned above.[1]

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[1] The preceeding materials are reprinted from the Reginald Heber Smith materials prepared at the University of Pennsylvania Law School.

Defenses to Eviction.

There are many possible defenses to eviction, many of them demonstrated in the cases that follow. The most obvious, is simply to prove that what the landlord alleges, non-payment of rent for example, is not true. There are two goals to the defenses of the tenant. The first and perhaps most important is to stay the eviction proceedings for as long as possible. This can insure that the tenant at least has the time to find other housing and at best has an opportunity to fight the eviction while still occupying the property. The second goal of course is to completely void the landlord's action. In this generally landlord oriented society, the second goal is often difficult to achieve.

The dissent by Justice Douglas in Williams v Shaffer discusses some of the problems facing the low-income tenant hit with an eviction action.

Williams v Shaffer
87 Sup. Ct. 772 (1967)

Facts and opinion, 222 Ga. 334, 149 S. E. 2d. 668
Petition for writ of certiorari Denied, Jan. 23, 1967.

Mr. Justice Douglas, with whom the Chief Justice concurs, dissenting.

This case involves an important question regarding the right of a poor tenant to remain in possession of his shelter and defend against eviction in a court of law. It is part of the larger problem regarding the inability of indigent and deprived persons to voice their complaints through the existing institutional framework, and vividly demonstrates the disparity between access of the affluent to the judicial machinery and that of the poor in violation of the Equal Protection Clause.

The Georgia summary eviction statute provides that a landlord may oust a tenant in a very swift, expedient manner. The landlord files with a judge of the superior court of justice of the peace an affidavit that the tenant has held over or has failed to pay rent. (Ga. Code Ann. Section 61-301 (1966); and the judge issues a dispossessory warrant ordering the sheriff to evict the tenant and his possessions. Ga. Code Ann. Section 61-302 (1966). The tenant may arrest the proceedings and prevent his summary eviction by filing a counter-affidavit denying the landlord's allegations (Ga. Code Ann. Section 61-303 (1966) and thereby obtain a jury trial on the facts in issue. But in order to remain in possession and obtain a trial (See Ga. Code Ann. Section 61-304 (1966) the tenant must "tender a bond with good security payable to the landlord, for the payment of such sum, with costs as may be recovered against him on the trial of the case." Ga. Code Ann. Section 61-303 (1966). If the tenant is not able to furnish the security bond, he is summarily evicted. The effect is that the indigent tenant is deprived of his shelter, and the life of his family is disrupted-all without a hearing-solely because of his poverty.

In this case respondent, petitioners' landlord, obtained a dispossessory warrant after filing an affidavit that petitioners had failed to pay rent. Petitioners attempted to file counter-affidavits raising a number of defenses, together with affidavits that they were unable to post security due to their indigency.

Apparently the affidavits were rejected. Petitioners then petitioned the Superior Court attempting to arrest the summary eviction. They sought vacation of the dispossessory warrants and injunctions against the landlord and the sheriff restraining them from executing the warrants. Each petitioner offered to pay into the court registry any rents due or to become due during the pendency of the act on. Their petitions were denied and the action dismissed. Thereafter, petitioners were summarily evicted. On appeal, the Georgia Supreme Court held that the case was moot because petitioners had been evicted.

The State, acting on the landlord's behalf, argues that certiorari should be denied on that ground. Whether or not a case is moot is a federal question which must be resolved by this Court. The finding of mootness by the State Supreme Court is not binding on us. See Ward v Love County, 253 U.S. 17, 22; Love v Griffin, 266 U.S. 32, 33-34; Liner v Jafco, 375 U.S. 301. The mootness doctrine is a beneficial one, expressive of the need for adverse parties who will vigorously argue the conflicting contentions to the Court and a necessary one in light of the requirements of Article III. But if this case were held to be moot, no tenant would ever be able to bring the statute to this Court. His eviction would render the case moot and preclude a challenge to the very statute causing the eviction. The statue would be immune from the constitutional challenge. Perhaps I am wrong. But the point is so substantial as to require oral argument.

The effect of the security statute is to grant an affluent tenant a hearing and to deny an indigent tenant a hearing. The ability to obtain a hearing is thus made to turn upon the tenant's wealth. On numerous occasions this Court has struck down financial limitations on the ability to obtain judicial review. See, e.g., Griffin v Illinois, 351 U.S. 12; Burns v Ohio, 360 U.S. 252; Smith v Bennett, 365 U.S. 708. We have recognized that the promise of equal justice for all would be an empty phrase for the poor, if the ability to obtain judical relief were made to turn on the length of a person's purse. It is true that these cases have dealt with criminal proceedings. But the Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters. I can see no more justification for denying an indigent a hearing in an eviction proceeding solely because of his poverty than for denying an indigent the right to appeal (Burns v Ohio, supra), the right to file a habeas corpus petition (Smith v Bennett, supra), or the right to obtain a transcript necessary for appeal (Griffin v Illinois, supra).

It is no answer to say that the Georgia procedure is fairer than the procedures of some states, whereby a tenant can be evicted without any opportunity for a hearing. Though a state may not constitutionally be required to afford a hearing before its process is used to evict a tenant, having provided one it cannot discriminate between rich and poor. It cannot consistently with the Equal Protection Clause provide a hearing in such a way as to discriminate against some "on account of their poverty." Griffin v Illinois, supra at 18.

The problem of housing for the poor is one of the most acute facing the Nation. The poor are relegated to ghettos and are beset by substandard housing at exorbitant rents. Because of their lack of bargaining power, the poor are made to accept onerous lease terms. Summary eviction proceedings are the order of the day. Default judgements in eviction proceeding are obtained in machine gun rapidity, since the indigent cannot afford counsel to defend. Housing laws often have a built-in bias against the poor. Slumlords have a tight hold on the Nation. Lyford, the Airtight Cage (1966). And see Schoor, Slums and Social Insecurity (1964).

The plight of the poor is being somewhat ameliorated by federal and state programs (particularly the Neighborhood Legal Services Under OEO) and by private organizations dedicated to the representation of indigents in civil matters. This Court of course does not sit to cure social ills that beset the country. But when we are faced with a statute that apparently violates the Equal Protection Clause by patently discriminating against the poor and thereby worsening their already sorry plight, we should address ourselves to it. I would grant certiorari.

Mr. Justice Brennan is also of the opinion that the petition for a writ of certiorari should be granted.

WEST HAVEN HOUSING AUTHORITY v. SIMMONS
5 Conn. Cir. 282, 250 A.2d 527 (App. Div. 1968)

JACOBS, Judge.

The complaint in this summary process action alleged these facts: The defendants entered into possession of the leased premises on the first day of November, 1966, under a written lease, for the term of one month, renewable for successive terms of one month each, at a monthly rental of $72, payable in advance, on the first day of each month. On July 12, 1967, the plaintiff gave the defendants the statutory notice that they were to quit possession of the premises on or before July 18, 1967, for failure to pay the rent due for the months of May, June and July, 1967.

..............Judgment was rendered for the plaintiff to recover possession of the premises described in the complaint upon the ground of nonpayment of the rent.

Upon the taking of an appeal, the defendants filed on application in the trial court for waiver of security on appeal upon the ground of defendants' indigency and attached an affidavit to the motion showing the defendants' financial condition.

On January 12, 1968, the trial court held a special hearing on the defendants' application for waiver of security on appeal. The court found that no rent had been paid since May 1, 1967, nor had the defendants offered to pay any part of the rent due; that the record contained "dilatory tactics, and (was) loaded with defenses interposed to delay and obstruct the summary process action;" and that the "appeal is being taken for the purpose of delay." Accordingly, the court denied the application for waiver of security on appeal.

"The right to an appeal is not a constitutional one, nor one based upon principles of natural justice. It is but a statutory privilege which an aggrieved party has the right to avail himself of only when he has strictly complied with the provisions of the statutes and rules upon which the privilege is granted." Bronson v. Mechanics Bank, 83 Conn. 128, 133, 75 A. 709, 711; see Bennett v. United Lumber & Supply Co., 110 Conn. 536, 538, 148 A. 369. "An appeal in this state is a statutory privilege accorded only if the conditions fixed by the statutes and rules of court for taking...and prosecuting it are complied with." Kennedy v. Walker, 135 Conn. 262, 266, 63 A. 2d 589, 591. "Under its general authority to regulate appellate procedure the legislature has the power to require the giving of a bond or undertaking as a condition precedent to the right appeal or sue out a writ of error, unless such power is clearly excluded by the constitution. Such statutes do not violate constitutional provisions granting the right of appeal, as they do not restrict or deny the right, but merely regulate the manner of exercising it ***." 4A C.J.S. Appeal and Error § 502b, p. 208. "The statutes (relating to summary process actions) almost invariably authorize an appeal by the person against whom the judgment is given in the proceeding, such appeal being effective to stay the execution of a judgment of dispossession only in case the appellant gives a bond or undertaking sufficient to satisfy any damage to the plaintiff caused by the continued withholding of possession." 2 Tiffany, Landlord and Tenant § 284, p. 1805; see 52A C.J.S. Landlord and Tenant § 784 a; Pollack v. Ro-An of New England, Inc., 23 Conn. Sup. 196, 1 Conn. Cir. 173, 174, 180 A.2d 293. Thus, it is left to the legislature to provide the manner of taking an appeal, and the legislature has undoubtedly the power to provide such requirements and attach such conditions as are necessary to protect the adverse party.

(4) Section 52-542 of the General Statutes provides that "(w)hen any appeal is taken by the defendant in an action of summary process, he shall give a sufficient bond with surety to the adverse party, to answer for all rents that may accrue***." A sufficient bond with surety is essential to a valid appeal; see Palmer v. Des Reis, 136 Conn. 627, 630, 73 A.2d 327; and "is solely for the protection of the appellee." Palmer v. Des Reis, 135 Conn. 388, 389 64 A.2d 537, 538.

The defendants insist that the statutory requirement of a bond with surety as a condition precedent to the appeal as applied to them unconstitutionally discriminates against them as indigent defendants in violation of the equal protection clause of the United States constitution and article first, § 10, of the constitution of Connecticut.

It would certainly require strong authority to induce us to come to the result claimed by the defendants. The defendants rely upon an opinion by Mr. Justice Douglas, with whom the chief justice concurred, dissenting from the denial of certiorari in Williams v. Shaffer, 385 U.S. 1037, 87 S. Ct. 772, 17 L.Ed.2d 683. In that case, the petitioners were unable, owing to indigency, to furnish the security bond required by Georgia Code Annotated § 61-304 (1966). The Supreme Court of Georgia held that the question involved was moot; the appeal was dismissed because the petitioners had been evicted. Williams v. Shaffer, 222 Ga. 334, 149 S.E.2d 668.

It may well be true that in Georgia an indigent tenant may be deprived of his shelter, and the life of his family disrupted--all without a hearing--solely because of his poverty. Surely it cannot be said that these defendants were denied a full and plenary hearing on the merits. And when we take a look at the record in this case, we would be hard put to say that the defendants lacked the economic power to make themselves heard in a court of law; indeed, seldom in our experience with summary process actions have tenants received such zealous and vigorous advocacy of their rights as is reflected by the record and briefs, which comprise some 140 typewritten pages. "This Court of course does not sit to cure social ills that beset the country." Williams v. Shaffer, 385 U.S. 1037, 1041, 87 S.Ct. 772, 774.

Roberts v. La Vallee, 389, U.S. 40, 88 S. Ct. 194, 19 L.Ed. 2d 41, also cited by the defendants, is distinguishable on the facts. The petitioner was indigent. He was charged with multiple offenses: robbery, larceny and assault. At trial, he asked the court to furnish him, at atate expense, with minutes of a prior preliminary hearing at which the major state witnesses had testified. His request was denied. The petitioner was convicted of the crimes charged and sentenced to a term of fifteen to twenty years in prison. It was in that context that the court said (p. 42, 88 S. Ct. p. 196): "Our decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."

(5) The defendants here had an obvious choice: they could have relinquished possession or, if they wanted to take an appeal, given sufficient bond with surety. See Hier v. Anheuser-Busch Brewing Ass'n, 52 Neb. 144, 145, 71 N.W. 1005; Stoler v. Fraternal Order of Beavers, 171 Pa.Super. 170, 172, 90 A.2d 304; Horn v. Blackwell, 212 S.C. 480, 484, 48 S.E.2d 322.

(6) We fail to see that the statute under attack (§ 520 542) violates constitutional precepts.

(7) Want of bond with surety, where bond with surety is by statute a prerequisite of review, furnishes a sufficient ground of dismissal of the appeal.

The motion for review is denied; the appeal is dismissed.

In this opinion KOSICKI, P.J., and DEARINGTON, J., concurred.

ORDER ON MOTION FOR TERMINATION OF STAY OF EXECUTION

KOSICKI, Presiding Judge.

We have before us the entire file in the case. The record and briefs comprise some 140 typewritten pages. Upon a review of the whole matter, we are satisfied that Judge DiCenzo was justified in concluding, as he did when he denied the defendants' application for a waiver of security on appeal, "that this appeal is being taken for the purpose of delay."

Housing Codes,

The most important questions to ask about housing and building codes in the context of landlord-tenant relations are questions which ask what duties are imposed in either of the parties by the statutes. This question is particularly important for the low-income tenant who is frequently without a lease to indicate any duty at all owed by the landlord to the tenant. In the main housing codes in urban areas concentrate the landlord's duties in those areas of the building and services which a single tenant could not control. That is landlords are generally required to keep public ways clean and well-lighted, and are frequently required to provide minimal services to the building as well. These services generally include heat, water and sanitation services. In addition there may be laws governing the number of people to whom spaces of a certain size may be rented. This sort of rule may also affect the tenants rights to the number of people who may live in the apartment or room that he has rented.

Following is a representative housing code and two cases which indicate some of the problems involved in determining what effect a housing code may have on the tenants rights and upon the lease.

HOUSING CODE OF NEW HAVEN, CONNECTICUT

(Sections 300 through 301 govern the provision of basic facilities.)
Par. 300. Basic facilities for dwelling units.

(a) Cooking and kitchen facilities. Every dwelling unit shall contain a room or space for the storage, preparation and cooking of food, which shall include space for a stove or other cooking facilities and space for dry food storage and space for refrigerated food storage; and shall include a kitchen sink installed. The sink shall be in good working condition and properly connected to a hot and cold running water system under pressure and sewer system, which sink and systems shall be installed and maintained in a manner prescribed by ordinances, rules and regulations of the city.

(b) Bathroom facilities. Every dwelling unit, except as otherwise permitted under sub-paragraph (c) of this paragraph, shall be equipped with a complete bathroom fixture group consisting of a flush water closet, lavatory basin, and bathtub or shower in good working condition and installed and maintained in a manner prescribed by ordinances, rules and regulations of the city. Said fixture group shall be properly connected to an approved sewer system and to an approved hot and cold running water system under pressure, except that the flush water closet shall be connected to an approved sewer system and to an approved cold running water system under pressure. The flush water closet, lavatory basin and bathtub or shower need not be installed in the same room, but said room or rooms shall afford privacy to a person within said room or rooms.

(c) Sharing of bathroom facilities. The occupants of not more than two (2) dwelling units may share a single flush water closet and/or a single lavatory basin and/or a single bathtub or shower if:

(1) The dwelling units were created on or before September 30, 1954;
(2) Neither of the two (2) dwelling units contains more than two (2) rooms, provided that, for the purposes of this provision, a kitchenette or an efficiency kitchen with not more than sixty (60) square feet of floor area shall not be counted as a room;
(3) The habitable area of each of such dwelling units shall equal not more than two hundred and fifty (250) square feet of floor area;
(4) Such water closet, lavatory basin and bathtub or shower shall be in a good working condition, installed and maintained, and properly connected as required in sub-paragraph (b) of this paragraph;
(5) Such shared facility or facilities are located within the dwelling so as to be reasonably accessible from a common hall or passageway to all persons sharing such facility or facilities; and that
(6) Such shared facility or facilities are contained within a room or rooms which affords privacy to a person within said room or rooms.

(d) Rubbish and garbage disposal. Every dwelling unit shall be supplied with adequate rubbish storage facilities and with adequate garbage disposal facilities or garbage storage containers whose type and location are approved by the enforcing officer. It shall be the responsibility of the owner to supply such facilities or container for all dwelling units in a dwelling containing more than four (4) dwelling units and for all dwelling units located on premises where more than four (4) dwelling units share the same premises. In all other cases it shall be the responsibility of the occupants to furnish such facilities or containers.

(e) Water-heating facilities. The water-heating facilities necessary to provide the hot water required under sub-paragraphs (a), (b) and (c) of this paragraphs 405 and 412...shall be properly installed and connected to the hot water lines required under those sections, shall be maintained in safe and good working conditions, and shall be capable of heating water to such a temperature as to permit an adequate amount of water to be drawn at every required kitchen sink, lavatory basin, bathtub or shower at a temperature of not less than one hundred and twenty (120) degrees Fahrenheit. Such supplied water-heating facilities shall be capable of meeting the requirements of this sub-section when dwelling, dwelling unit, rooming house, or rooming unit heating facilities required under the provisions of paragraph 400 and sub-paragraph (e) of Paragraph 301 are not in operation.

(f) Means of egress. Every dwelling unit shall have safe, unobstructed means of egress leading to safe and open spaces at ground level as required by the statutes, ordinances and regulations of the State of Connecticut and the city.

(The following provisions are typical of those governing light and ventilation. The remainder of the section covers heating, electrical facilities, etc.)

Par. 301. Light, heat, ventilation facilities; owner or lessor must furnish in living premises.

No person shall occupy as owner-occupant or let to another for occupancy any dwelling or dwelling units, for the purpose of living therein, which does not comply with the following requirements:

(a) Windows, skylights for lighting habitable rooms. Every habitable room shall have at least one windown or skylight facing directly to the outdoors. The minimum aggregate glass area of windows for habitable rooms shall be not less than one-tenth (1/10) of the floor area of the room served by them and not less than ten (10) square feet. Whenever walls or other partitions of structures face a window of any habitable room and such light-obstruction structures are located less than three (3) feet from the window and extend to a level above that of the ceiling of the room, such a window shall not be included as contributing to the required minimum total window area. Whenever the only window in a room is a skylight-type window in the top of such room, the minimum aggregate glass area of such skylight shall be not less than three-twentieths (3/20) of the total floor area of such room.

(b) Ventilation of habitable rooms. Every habitable room shall have at least one window or skylight which can easily be opened, or such other device as will adequately ventilate the room. The total of the openable window area in every habitable room shall be equal to at least forty-five percent (45%) of the minimum aggregate glass area of the window or skylight-type window as required in sub-paragraph (a) of this paragraph except where there is supplied some other device affording adequate ventilation and approved by the enforcing officer.

(c) Light, ventilation for bathrooms. Every bathroom and water closet compartment shall comply with the light and ventilation requirements for habitable rooms contained in sub-paragraphs (a) and (b) of this paragraph except where the bathroom or water closet compartment is adequately ventilated by a ventilation system which is kept in continuous or automatic operation and approved by the enforcing officer.

(The next section deals with maintenance requirements. In addition to the maintenance requirements given below, similar requirements are also provided for stairs, porches, plumbing fixtures, bathroom floors, and exterior wood surfaces. Rainwater must be drained, flaking, peeling, or loose paint is prohibited, and every facility which is required by the ordinance must "function safely and effectively, and shall be maintained in satisfactory working condition.")

Par. 302. Maintenance requirements imposed on owner or lessor of living premises.

No person shall occupy as owner-occupant or let to another for occupancy any dwelling or dwelling unit, for the purpose of living therein, which does not comply with the following requirements:

(a) Foundations, floors, walls, ceilings, roofs. Every foundation, floor, wall, ceiling, and roof shall be reasonably weather-tight, and rodent-proof; shall be capable of affording privacy; and shall be kept in good repair.

(b) Windown, outside openings. Every window, exterior door, and basement hatchway shall be reasonably weather-tight, water-tight, and rodent-proof; and shall be kept in sound working condition and good repair.

(The next section deals with occupancy and space requirements, another customary feature of housing codes. Ceiling height is also regulated, as is the use of basement rooms as living areas.)

Par. 303. Space, use, location requirements imposed on occupants and lessors.

No person shall occupy or let to another for occupancy any dwelling or dewlling unit, for the purpose of living therein, which does not comply with the following requirements:

(a) Total floor area per occupant. Every dwelling unit shall contain at least one hundred and fifty (150) square feet of floor area for the first occupant thereof and at least one hundred (100) additional square feet of floor areas to be calculated on the basis of total usuable floor area of habitable rooms.

(b) Floor area of sleeping rooms. In every dwelling unit of two (2) or more rooms, every room occupied for sleeping purposes by one occupant shall contain at least seventy (70) square feet of usuable floor area, and every room occupied for sleeping purposes by more than one occupant shall contain at least fifty (50) additional square feet of usuable floor area for each additional occupant thereof.

(The remainder of the substantive sections impose an obligation to keep the premises clean and sanitary. Responsibilities are divided between owners and occupants. For example, the owner is responsible for shared and common areas, and the occupant for his own dwelling.

COMMENT, BUILDING CODES, HOUSING CODES AND THE CONSERVATION OF CHICAGO'S HOUSING SUPPLY, 31 University of Chicago Law Review 180, 186, 187 (1963)

The first principle for the design of codes, both building and housing, is that they must bear a reasonable relation to existing conditions. If standards are set too low--if the economy can afford and the market generally demands higher standards--there is little point in having a code cluttering up the books. On the other hand, "exceptionally high standards will result in a program with costs which no reasonable community can hope to undertake." The effect will be either circumvention or a general raising of prices that will encourage overcrowding. This is obvious with examples that are sufficiently exaggerated. . . . But in matching a code to a real-life situation, it is necessary to be more subtle. An additional cost of a few hundred dollars can make the difference when the decision is whether or not to rehabilitate. But such relatively small differences are hardly noticed by the courts which in fact impose on owners improvements costing thousands of dollars per building.

The Landlords role in the upkeep of urban housing property

The ancient view of the tenant as having full responsibility for the property and its repair and upkeep has had strange and destructive effects on the rights of tenants in the urban housing market. Frequently, except as to public ways the landlord has been able to avoid exercising any responsibility for repairing or maintaining the property in safe and sanitary condition. This has been one of the causes of the accelerated deterioration or urban buildings. The following dissenting opinion written by Judge Bazelon in 1953 gives a good capsule of the history of landlord tenant relations and the role of the courts and legislative bodies in making that area of the law more responsive and responsible as to contemporary urban conditions.

The case itself, involves in injury to a child when a retaining wall on the defendant landlord's property collapsed. The majority of the court rules for the defendant holding that, "...absent any statutory or contractual duty the lessor is not responsible for an injury resulting from a defect which developed during the term." The court said that during the time of the tenancy, the tenant has the general duty to repair the premises.

Judge Bazelon, forecasting the tone of litigation of the 1960's dissents.

Bowles v Mahoney*
202 F2d 320 (1953)

BAZELON, Circuit Judge (dissenting)

The key to the decision of the court, relieving both the landlord and the District of Columbia[1] from liability, lies in its adherence to the rule at common law that "absent any statutory or contract duty, the lessor is not responsible for an injury resulting from a defect which developed during the term."[2]

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[1] As I understand the court's opinion, the District of Columbia's non-liability arises from the same rule which places responsibility on the tenant himself.

[2] Majority opinion, p. 6.

*Footnotes have been edited and renumbered by the Editor.

I think that rule is an anachronism which has lived on through stare decisis alone rather than through pragmatic adjustment to "the felt necessities of our time." I would therefore discard it and cast the presumptive burden of liability upon the landlord. This, I think, is the command of the realities and mores of our day.

Courts have gradually recognized, at least in part that the exalted position which the landlord held at early common law is discordant with the needs of a later day. At early common law a lessee was regarded as having merely a personal right against the lessor. But as a result of several remedies that were created in the lessee's favor he became to be regarded as having rights in rem, and the lease "was regarded as a sale of the demised premises for the term." Upon this thesis, the courts held that a lease was "like the sale of specified personal property to be delivered" and applied the same concept of caveat emptor that prevailed generally in that day with respect to the sale of all chattels. As a corollary of this concept, courts generally held that the "destruction or any depreciation of (the) value (of the leased premises), other than such depreciation occasioned by a fault of the lessor, was entirely the loss of the lessee."[3]

"Both the English and the American law have broken almost entirely away from the ancient rule of caveat emptor,"[4] with respect to the sale of chattels generally. To some extent this development has been reflected in the law governing landlord and tenant relations. For example, now "the lessor like a vendor, is under the obligation to disclose to the lessee (not only) concealed dangerous conditions existing when possession is transferred, of which he has knowledge..." but also any information (in his possession) which would lead a reasonable man to suspect that the danger exists..."[5] But with respect to the landlord's responsibility for the condition of the premises during the term of the lease, courts have failed to reflect this development. As a result, the common law in this respect still lags behind the modern notion that in general one who sells an article is presumed to warrant that it is good for the purpose for which it is sold. In order to keep pace, the law should recognize that one pays for the temporary use of a dwelling, the parties contemplate that insofar as reasonable care on the part of the owner can assure it, the dwelling will be safe and habitable, not only at the time of possession is delivered but throughout the period for which payment is made. It is fair to presume that no individual would voluntarily choose to live in a dwelling that had become unsafe for human habitation. The community's enlightened self-interest requires the same presumption. It follows that, at least in the absence of express provision to the contrary, a landlord who leases property should be held to a continuing obligation to excercise reasonable care to provide that which the parties intended he should provide, namely, a safe and habitable dwelling. Applying this view to the circumstances of the present case, the landlord would be liable for the injuries to little Ralph Mahoney as the tenant's invitee. For the lease did not expressly make the tenant responsible for repairs and there is no doubt that the owner of this dilapidated dwelling[6] failed to exercise reasonable care to prevent the collapse of the cracked retaining wall. And since the court's reason for excusing the District of Columbia from liability is that the tenant, and not the landlord, had the duty to repair, that reason would no longer be valied.

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[3] Church, C. J., in Becar v Flues, 1876, 64 N.Y. 518, 520.

[4] Harkrider, Tort Liability of a Landlord, 26 Mich. L. Rev. 260, 261 (1928).

[5] Prosser on Torts 666, 650-651 (1941).

One writer has suggested that the rule at common law was evolved at a time when, for the most part, leased property consisted of farm lands and the dwellings thereon were only a minor consideration. But he said, "one has merely to consider at the present time the number of crowded tenement houses in cities, which are in many cases occupied by people who are so poor that they are unable to care for themselves, to see the desirability of the landlord's being obliged to keep such buildings from falling into a state of decay and dilapidation. This affords but a striking example of the changes resulting from the growth of the cities and the establishment of new living conditions under which the landlord's relation to the leased premises remains naturally intimate and his duty to make repairs apparent."[7]

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[6] This condition of the leased premises is apparent from the photographs included in the record. Plaintiff's Exhibits Nos. 1-A, 10-B, 1-C.

[7] Note 7 Cornell L.Q. 386, 388 (1922).

Two reasons have been advanced to justify perpetuation of the rule at common law under modern day conditions. First, it is said that the tenant should bear the responsibility for repair during the term of the lease because his control and possession of the premises give him the opportunity to know their condition, whereas the landlord has no such opportunity. This reason might have some validity if the landlord had no right to go upon the premises. But if the landlord to have the duty to repair, then the concomitant right to enter upon the premises for inspection and repair would necessarily implied. And, in any case, the landlord can always reserve the right to enter the premises in order to inspect and repair them. Indeed, the case at bar shows that the landlord did enter to make repairs from time to time, not that he was ever refused such entry. And insofar as "notice" is the reason for the rule, it bears emphasis that the landlord had specific notice of the defect which caused the injuries in this case.

The second and a more sophisticated reason for relieving the landord from liability is the hypothesis that" it is still socially desirable not to discourage investment in and ownership of real estate, particulary private dwellings." This objective may well be desirable. But it is a fallacious oversimplification to suppose that the common law rule has much to do with the rate of investment in real property. On the other hand, it seems clear to me that the rule operates to defeat the interests of utility and justice. "Upon whom is the loss to be placed, more justly than upon the landlord? Upon the tenant who, because of his poverty...risks his own neck to be in the house? Upon the tenant's equally poor guest, the mailman, the visiting nurse, etc.?"[8] Courts are not impervious to the unequal bargaining position of the parties in interpreting their agreements. For, as Mr. Justice Cardozo said, "Rules derived by a process of logical deduction from pre-established conceptions of contract and obligation have broken down before the slow and steady and erosive action of utility and justice."[9] This court illustrated that in Kay v Cain, 154 F2d 305, 306 (1946), where we said that "...it is doubtful whether a clause which did undertake to exempt a landlord from responsibility for such negligence would now be valid. The acute housing shortage in and near the District of Columbia gives the landlord so great a bargaining advantage over the tenant that such an exemption might well be held invalid on grounds of public policy." There is no reason to adopt an inconsistant view where, as here, the dwelling constitutes the entire premises and there is no clause expressly exempting the landlord from liability.

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[8] For an outline of some of the economic considerations, see Shulman & James, Cases and Materials on Torts 588-9, 587-8. (1912)

[9] Selected Writings of Benjamin Nathan Cardozo 148 (Hall Ed. 1947).

In a great many states, the common law rule to which the court adheres in this case has been changed by statutes based upon a recognition of its social and economic undesirability. For example, in explanation of the statute changing the rule in California, The Commissioner's note states,

> "This section changes rule upon this subject to conform to that which, not-withstanding steady judicial adherence for hundreds of years to adverse doctrine, is generally believed by unprofessional public to be law, and upon which basis they almost always contract. The very fact that there are repeated decisions to the contrary, down to the year 1861, shows that the public do not and cannot understand their justice, or even realize their existence. So familiar a point of law could not rise again and again for adjudication were it not that the community at large revolt at every application of the rule."[10]

It may be fairly asked, should not the courts of the District of Columbia await a congressional change of the rule? Mr. Justice Sutherland provided the answer to this query in Funk v United States, 290 U.S. 371, 381-82 (1933) when he said, "It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquate rule of the past?" He went on to point out that "that flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law...And as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms."

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[10] Kerr's Cyclopedic Codes of California 2232 Section 1941 of Civil Code, note 17 (1920).

There is no fixed line dividing the sphere of action as between the legislature and the courts for effecting needed change of a common law rule. This line should not be marked in accordance with "methaphysical conceptions of the nature of judge-made law, nor by the fetish of some implacable tenet, such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice."[11] "Change of this character should not be left to the Legislature.[12] "If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors."[13]

It is undoubtedly true that many landlords have shaped their conduct in reliance upon the rule which I would discard. This consideration is entitled to some weight. But, in my view, it cannot outweigh the social and economic need for shifting the distribution of the risk. To those landlords who have acted in good faith there may undoubtedly be some hardship. But in our realistic experience, they are possessed of the better means to discharge this burden. We need give slight consideration to other landlords who would employ the rule to press their advantage to the extent of permitting a known hazard to exist in callous disregard of the safety of fellow human beings who are obviously without the means to protect themselves.

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[11] Selected Writings of Benjamin Nathan Cardozo 170 (Hall Ed. 1947).

[12] Wheeler, J., concurring in Dwy v Conneticut Co., 1915, 92 A 883, 891.

[13] Selected Writings of Benjamin Nathan Cardozo 172 (Hall Ed. 1947).

COMMENTS

1. It is important to note that Judge Bazelon is talking about a Common Law Rule and not a statutory rule. What is the difference? Why is this difference important?
2. Much of the law governing landlord-tenant relationships is grounded in the common law. It is one of the last areas to become codified by modern statute.

Whetzel V Jess Fisher Management Co.*
282 F2d 943 (D.C. Cir. 1960)

BAZELON, Circuit Judge

In Bowles v Mahoney, 202 F2d 320 (1952), this court adhered to the common-law rule that "absent any statutory or contract duty, the lessor is not responsible for an injury resulting from a defect which developed during the term." Since that case was decided, the Commissioners of the District of Columbia have promulgated regulations maintenance and repair of residential property. The primary question here presented is whether these regulations impose a "statutory...duty" on the lessor not presented in Bowles v Mahoney. We conclude that they do.

The issue arised upon an appeal from a summary judgement entered against the plaintiffs below. Their amended complaint alleged that on March 1, 1956, Audrey Whetzel rented an apartment from the appelle for $75.00 per month upon a one-year lease which did not affirmatively place the burden of repairs, other than those caused by the tenant's negligence, on either party.[1] On June 30, 1956, four months after she entered into possession, the entire bedroom ceiling fell, causing the injuries of which she complains. The principal theory of the action is that the appellee, with knowledge of the defect, negligently permitted the ceiling to remain in an unsafe condition.

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[1] The lease provided that the lessee would "keep the premises in good order and condition and surrender the same at the expiration of the term herein in the same order in which they are received, usual wear and tear and damage resulting from acts not caused by the tenant's negligence expepted. "(Emphasis supplied.) The landlord reserved the right of access to the premises" at any time for the purpose of inspection...or for the purpose of making any repairs the landlord considers necessary or desirable." The tenant agreed to give the landlord "prompt notice of any defects or breakage in the structure, equipment or fixtures of said premises." And promised not to make structural alterations or additions without permission.

For a discussion of the effect of statutes requiring the landlord to repair in cases where a lease placed the duty of repair squarely upon the tenant, see Fenerstein and Shestack "Landlord and Tenant--The Statutory duty to Repair, "45 II. L. Rev. 205, 220 (1950). Cf. Michaels V Brookchester, Inc., 1958 (26 N.J. 379, 140 A 2d. 199, 204.

*Footnotes edited and renumbered.

I. The Applicable Law

Appellant contends that the Housing Regulations establish a standard of conduct for the landlord, which, if negigently breached, allows an injured tenant to recover. They rely heavily on the landmark case of Altz v Lieberman, 1922, 233 N.Y. 16, 134 N.E. 703-704.

That case also involved a tenant injured by a falling ceiling, Judge Cardozo, writing for the New York Court of Appeals, held that the New York Tenement House Law, which provided that "every tenement house and all the parts thereof shall be kept in good repair" thus changed the ancient rule and imposed upon landlards a duty that "extends to all whom there was a purpose to protect." That statute did not specify who had the duty to repair; nor did it speak of tort liability. It only authorized penalties in criminal enforcement proceedings. Nevertheless, the court held that:

> "The Legislative must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made. The duty imposed become commensurate with the need. The right to seek redress is not limited to the city or its officers."

Other jurisdictions have accepted the view that regulations which explicitly or implicitly require a landlord to repair may render him liable for injuries resulting from a failure to comply.[2]

Indeed, in our own case of Hill v Raymond, 1935, 81 F2d. 278, we held that building regulations establishing certain standards for interior stairways were admissible as evidence of a landlord's negligence in failing to illuminate and to maintain a common stairway.

The view expressed in these cases is fully consistent with "the almost universal American and English attitude...that were legislation prescribes a standard of conduct for the purpose of protecting life, limb, or property from a certain type of risk, and harm to the interest sought to be protected comes about through breach of the standard from the risk sought to be obviated, then the statutory prescription of the standard will at least be considered in determining civil rights and liabilities." Sec. 286 (1934) Prosser, Torts 152-54 (2d Ed. 1955) Thayer, "Public Wrong and Private Action." 27 Harv. L. Rev. 317 (1914).

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[2] Rimoo Realty and Investment Corp. v La Vigne, 1943, 56 NE.2d. 953, 114 Ind. App. 211.

This axiom of tort law tacitly recognized that the continued vitality of the common law, including the law of torts, depends upon its ability to reflect contemporary community values and ethics. Whether or not a duty of care exists is, basically, a question of law. A penal statute which is imposed for the protection of particular individuals establishes a duty of care based on contemporary community values and ethics. The law of torts can only be out of point with community standards if it ignores the existance of such duties. See Evers v Davis, 1914 90 A. 677.

The courts have not agreed, however, on the precise affect to be given a breach of a statute. A majority of American Courts hold that the unexcused violation of a statute which is intended to protect a class of persons, of which the plaintiff is a member, against the type of harm which has in fact occured is negligence _per se_. That is to say, such violation is negligence as a matter of law and the jury must be so instructed. (Prosser, _Torts_ 161 (1955). But a substantial and growing number of jurisdictions hold that violation of a penal statute is "only evidence of negligence which the jury may accept or reject as it sees fit." _Ibid._

A review of these cases makes it clear that in this jurisdiction the rather rigid doctrine of negligence _per se_ has been tempered by important limitations. Our law is clearly moving in the direction of leaving more and more of the question of negligence as derived from statutory standards for the jury to consider.

II. The Instant Case

Turning to the instant case, we must determine the authority of the District of Columbia Housing Regulations and their effect upon the landlord's duty of care toward his tenants.

Under Sec. 2304, "No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin." At the very least, this imposes an obligation upon the landlord to put the premises in safe condition prior to their rental.

The regulations also impose other obligations which are extended to both the landlord and tenant in order to achieve their broad purposes. Section 2301 provides that "No owner, licensee, or tenant shall occupy or permit the occupancy of any habitation in violation of these regulations." Section 2501 directs, _inter alia_, that:

> "Every premises accommodating one or more inhabitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe."

And more specifically Sec. 2504 requires:

> "Each interior wall or ceiling shall be structurally sound and free of loose plaster or other loose structural or surfacing material. Each interior wall or ceiling shall be free of holes and wide cracks."

Thus it appears that Sec. 2301 imposes upon the appellee a duty of care toward its tenants. This duty can be satisfied either by making the necessary repairs or by terminating use of the premises as a place of human habitation. Breach of that duty is, according to the principles which we have discussed at least evidence of negligence.

But Sec. 2301 also creates a duty of care which the appellant owes to herself. Breach of this duty is likewise at least evidence of contributory negligence. The question then is, does her contributory negligence so clearly appear from the face of the complaint that she is not entitled to go to trial? We think not.

It is possible that facts may be developed at trial which would warrant a charge of negligence or contributory negligence as a matter of law.

For example, recovery would be barred if the jury finds that in the total circumstance of the case the tenant unreasonably exposed herself to danger by failing to vacate the premises or to keep them in repair. Some of the more obviously relevant circumstances would include the lease provisions, if any, concerning the duty to repair and the landlord's right of entry for that purpose; the latent or patent character of the defect and the tenant's knowledge or opportunity for knowledge thereof; who repaired previous defects, if any; the amount of rental and term of lease, on the one hand, against the extent and nature of the defect and cost of repair on the other; and the bargaining position of the parties in entering into the lease. In the present case, the jury would also consider, for example the fact that the defective ceiling is a common wall with the floor of the apartment above, over which a tenant has virtually no control.

Appellee contends, however, that even if the jury must weigh the duty imposed by the Housing Regulations upon the lessee, summary judgement was nonetheless appropriate because there are uncontridicted affidavits in the record showing that appellee had no notice of the defect in the ceiling. We think actual knowledge is not required for liability; it is enough if, in the excercise of reasonable care, appellee should have know that the condition of the ceiling violated the standards of the Housing Code. (Prosser, Torts 6 (1955).

We cannot say that upon trial a jury could not reasonably find that appellee should have known of the condition of the ceiling. The bathroom ceiling, located just off the bedroom in appellants apartment, had fallen and been repaired not long before appellant took possession. On New Year's Eve of 1956, just two months before appellant moved in, the living room ceiling of the adjoining apartment also fell. On April 1, 1956, appellant noticed a leak in her bedroom ceiling, and reported it to the janitor who was able to stop the leak by adjusting the radiator in the apartment above. But there is no evidence that he then inspected appellant's ceiling to determine if it had been weakened. Just before appellant moved in, appellee hired a contractor to inspect and repair the plaster in appellant's apartment. The contractor's affidavit, executed three years after the event, stated that he "carefully inspected and examined the entire apartment" and found the "plaster in the ceiling of the bedroom...in good sound condition." In view of the fact that the ceiling fell only four months after the alleged inspection, the jury might reasonably find that the inspection was negligently performed.

It follows from all that we have said that the District Court erred in granting summary judgment on the first count of appellant's amended complaint. We, therefore, reverse the judgment as to that count and remand with directions to proceed to trial.

So ordered.

Comments:

1. Does the court or the legislative branch actually overrule Bowles v Mahoney?

2. What duty is placed upon the tenant according to Judge Bazelon's interpretation of the rights and responsibilities of the District of Columbia Housing Regulations?

3. Make a list of what you consider to be reasonable responsibilities of the tenant in the multi-family dwelling toward maintaining safe and sanitary conditions.

4. What do you think it reasonable to require of a landlord in maintaining safe and sanitary conditions in a multi-family dwelling in which he is not an occupant?

5. If the landlord knows about defects in the premises before the lease is signed he may now be in a less enviable position than the landlord in Bowles v Mahoney. In Brown v Southall Realty, 237 A2 834 (1968) the court held that when the landlord knows of defects in the premises which make habitation unsafe and unsanitary before the lease is signed, the contract is void and illegal and an action for eviction by the landlord, even though based on nonpayment of rent, will not lie. The court said, "An illegal contract is void and confers no right upon the wrongdoer." There is an important difference in characterization that helps the court reach this decision. The court treats the agreement primarily as a regular contract, and pays no attention to the special considerations that are historically demanded of the landlord tenant relationship. What facts about the urban situation might make you agree with this new characterization? This is a situation in which the housing code makes it illegal to rent uninhabitable or unsanitary buildings.

Problem:

Your city has a housing code which simply requires that there be adequate sewage disposal. The city council has decided to draft a new housing code and is soliciting suggestions.

You are the head of a community action organization whose members, mostly low income rental tenants, want to make sure that their concerns are part of the final code.

Draft a suggested housing code dealing in non-technical terms (it is enough to suggest that you need reasonable heat or light without indicating technical requirements) with the standards that you want to have enacted, as well as the possible means of enforcement.

Several states have passed statutes which clearly give the tenant, as well as the government, the right to force the landlord to comply with the housing code of the particular state or city. The following statute was passed in 1969 in Illinois. The subsequent complaint is a model for actions that might be filed by tenants under the new law.

MUNICIPAL CODE-ZONING-VIOLATIONS

Ill. Rev. Stat., Ch. 24, § 11-13-15

In case any building or structure, including fixtures, is constructed, reconstructed, altered, repaired, converted, or maintained, or any building or structure, including fixtures, or land, is used in violation of an ordinance or ordinances adopted under Division 13, 31 or 31.1 of the Illinois Municipal Code, or of any ordinance or other rgulation made under the authority conferred thereby, the proper local authorities of the municipality, or any owner or tenant of real property, within 500 feet in any direction of the property on which the building or structure in question is located who shows that his property or person will be substantially affected by the alleged violation, in addition to other remedies, may institute any appropriate action or proceeding (1) to provent the unlawful construction, reconstruction, alteration, repair, conversion, maintenance or use, (2) to prevent the occupancy of the building, structure, or land, (3) to prevent any illegal act, conduct, business, or use in or about the premises, or (4) to restrain, correct, or abate the violation. When any such action is instituted by an owner or tenant, notice of such action shall be served upon the municipality at the time suit is begun, by serving a copy of the complaint on the chief executive officer of the municipality, no such action may be maintained until such notice has been given.

In any action or proceeding for a purpose mentioned in this section, the court with jurisdiction of such action or proceeding has the power and in its discretion may issue a restraining order, or a preliminary injunction, as well as a permanent injunction, upon such terms and under such conditions as will do justice and enforce the purposes set forth above.

If an owner or tenant files suit hereunder and the court finds that the defendant has engaged in any of the foregoing prohabited activities, then the court shall allow the plaintiff a reasonable sum of money for the services of the plaintiff's attorney. This allowance shall be a part of the costs of the litigation assessed against the defendant, and may be recovered as such.

An owner or tenant need not prove any specific, special or unique damages to himself or his property or any adverse effect upon his property from the alleged violation in order to maintain a suit under the foregoing provisions.

MODEL BUILDING CODE COMPLAINT

1. This action is brought pursuant to the provisions of Section 11-13-15 of the Illinois Municipal Code, Illinois Revised Statutes, Chapter 24, Section 11-13-15 as amended (1969) to abate building code violations.

2. The plaintiff, ________________________________, is a tenant in an apartment located on the following described lot, in the City of Chicago, County of Cook, and State of Illinois, to-wit:

3. The defendant, ________________________________, (a corporation organized under the laws of the State of Illinois,) is the owner in fee of the above described premises.

4. Defendant's property is improved with a ______story apartment building containing ________ apartments. Plaintiff resides in an apartment on the _____floor, together with his wife and ______minor children. The other______ apartments are rented to tenants for dwelling purposes.

5. There is in force in the City of Chicago, in which the defendant's lot is located, an Ordinance, sometimes known as the Chicago Building Code, which has been from time to time amended, prescribing the measures to be taken to maintain every structure within the City in a clean, safe and healthful condition.

6. Since ________________defendant has failed to follow the measures prescribed by the following Sections of the Ordinance:

A.
B.
C.

7. By his failure to take measures to prevent, or remedy, the existence of the violations of the Chicago Building Code set forth in paragraph 6, the defendant has created a condition which endangers the health, safety, comfort and peace of mind of the plaintiff and his family.

8. Unless enjoined, the defendant will continue to maintain the building in a condition which violates the Chicago Building Code, with great injury and damage to the plaintiff and his family.

9. On or about ____________________ notice that this action was to be instituted was given to his Honor ________________; Mayor of the City of Chicago, its chief executive officer, together with a copy of this complaint.

WHEREFORE, plaintiff prays that:

1. The defendant be enjoined from maintaining his premises in violation of the Chicago Building Code and retain jurisdiction of this cause until all such violations are corrected.

2. This Court appoint a receiver to take possession of the Premises, its rents and profits, in order to make the necessary repairs to correct all violations of the Building Code.

3. This Court allow the plaintiff a resonable sum of money for the services of plaintiff's attorney to be allowed as part of the costs of the litigation assessed against the defendant.

4. The plaintiff have such other and further relief as may be just and proper.

____
Attorney for Plaintiff

Even without resort to statutes there may be a common law remedy for the tenant who was promised repairs before he agreed to sign a lease. Pines v Perssion suggests that failure to live up to these promises may nullify the lease.

PINES v. PERSSION

14 Wis.2d 590, 111 N.W.2d 409 (1961)

Action by plaintiffs Burton Pines, Gary Weissman, David Klingenstein and William Eaglestein, lessees, against defendant Leon Perssion, lessor, to receover the sum of $699.99, which was deposited by plaintiffs with defendant for the fulfillment of a lease, plus the sum of $137.76 for the labor plaintiffs performed on the leased premises. After a trial to the court findings of fact and conclusions of law were filed which determined that plaintiffs could recover the lease deposit plus $62 for their labor, but less one month's rent of $175. From a judgment to this effect a motion for review of that part of the judgment entitling defendant to withhold the sum of $175.

At the time this action was commenced the plaintiffs were students at the University of Wisconsin in Madison. Defendant was engaged in the business of real estate development and ownership. During the 1958-1959 school year plaintiffs were tenants of the defendant in a student rooming house. In May of 1959 they asked the defendant if he had a house they could rent for the 1959-1960 school year. Defendant told them he was thinking of buying a house on the east side of Madison which they might be interested in renting. This was the house involved in the lease and is located at 1144 East Johnson Street. The house had in fact been owned and lived in by the defendant since 1951, but he testified he misstated the facts because he was embarrassed about its condition.

Three of the plaintiffs looked at the house in June, 1959 and found it in a filthy condition. Pines tesified the defendant stated he would clean and fix up the house, paint it, provide the necessary furnishings and have the house in suitable condition by the start of the school year in the fall. Defendant testified he told plaintiffs he would not do any work on the house until he received a signed lease and a deposit. Pines denied this.

The parties agreed that defendant would lease the house to plaintiffs commencing September 1, 1959 at a monthly rental of $175 prorated over the first nine months of the lease term, or $233.33 per month for September through May. Defendant was to have a lease drawn and mail it to plaintiffs. It was to be signed by the plaintiffs' parents as guarantors and a deposit of three months' rent was to be made.

Defendant mailed the lease to Pines in Chicago in the latter part of July. Because the plaintiffs were scattered around the country, Pines had some difficulty in securing the necessary signatures. Pines and the defendant kept in touch by letter and telephone concerning the execution of the lease, and Pines came to Madison in August to see the defendant and the house. Pines testified the house was still in terrible condition and defendant again promised him it would be ready for occupancy on September 1st. Defendant testified he said he had to receive the lease and the deposit before he would do any work on the house, but Pines could not remember him making such a statement.

On August 28th Pines mailed defendant a check for $175 as his share of the deposit and on September 1st he sent the lease and the balance due. Defendant received the signed lease and the deposit about September 3rd.

Plaintiffs began arriving at the house about September 6th. It was still in a filthy condition and there was a lack of student furnishings. Plaintiffs began to clean the house themselves, providing some cleaning materials of their own, and did some painting with paint purchased by defendant. They became discouraged with their progress and contacted an attorney with reference to their status under the lease. The attorney advised them to request the Madison building department to inspect the premises. This was done on September 9th and several building code violations were found. They included inadequate electrical wiring, kitchen sink and toilet in disrepair, furnace in disrepair, handrail on stairs in disrepair, screens on windows and doors lacking. The city inspector gave defendant until September 21st to correct the violations, and in the meantime plaintiffs were permitted to occupy the house. They vacated the premises on or about September 11th.

The pertinent parts of the lease, which was dated September 4, 1959, are as follows:

1. "For and in consideration of the covenants and agreements of the Lessees hereinafter mentioned, Lessor does hereby devise, lease and let unto Lessees

the following described premises, to-wit:

"The entire house located at 1144 East Johnson Street, City of Madison, Dane County, Wisconsin, including furniture to furnish said house suitable for student housing.

2. "Lessees shall have and hold said demised premises for a term of one (1) year commencing on the first day of September, 1959***

3. "(Total annual rent was $2100, to be paid in monthly installments in advance, prorated over the first nine months of the term, or $233.33 per month. The deposit of three months' rent of $699.99 was to be applied for March, April and May of 1960.)

4. "The Lessees also agree to the following:*** to use said premises as a private dwelling house only***

5. "If Lessees shall abandon the demised premises, the same may be re-let by Lessor for such reasonable rent, comparable to prevailing rental for similar premises, and upon such reasonable terms as the Lessor may see fit; and if a sufficient sum shall not be realized, after paying the expenses of re-letting, the Lessees shall pay and satisfy all deficiences***

The trial court concluded that defendant repressted to the plaintiffs that the house would be in a habitable condition by September 1, 1959; it was not in such condition and could not be made so before October 1, 1959; that sec. 234.17, Stats. applied and under its provisions plaintiffs were entitled to surrender prossession of the premises; that they were not liable for rent for the time subsequent to the surrender date, which was found to be September 30, 1959.

MARTIN, Chief Justice.

We have doubt that sec. 234.17, Stats. applies under the facts of this case. In our opinion, there was an implied warranty of habitability in the lease and that warranty was breached by the appellant.

(1) There is no express provision in the lease that the house was to be in habitable condition by September 1st. We cannot agree with respondents'

contention that the provision for "including furniture to furnish said house suitable for student housing" constitutes an express covenant that the house would be in habitable condition. The phrase "suitable for student housing" refers to the "furniture" to be furnished and not to the general condition of the house.

(2) Parol evidence is inadmissible to vary the terms of a written contract which is complete and unambiguous on its face. Hunter v Hathaway, 1901, 108 Wis. 620, 84 N.W.. 996; 32 Am.Jur., Landlord and Tenant, secs. 130,134.

(3,4) The general rule is that there are no implied warranties to the effect that at the time a lease term commences the premises are in a tenantable condition or adapted to the purposes for which leased. A tenant is a purchaser of an estate in land, and is subject to the doctrine of caveat emptor. His remedy is to inspect the premises before taking them or to secure an express warranty. Thus, a tenant is not entitled to abandon the premises on the ground of uninhabitability, Sec I American Law of Property, sec. 3.45; 32 Am. Jur., Landlord and Tenant, sec. 247.

There is an exception to this rule, some courts holding that there is an implied warranty of habitability and fitness of the premises where the subject of the lease is a furnished house. This is based on an intention inferred from the fact that under the circumstances the lessee does not have an adequate opportunity to inspect the premises at the time he accepts the lease. See I American Law of Property, sec. 3.45; 35 N.Y. Univ.L. Rev. 1279, 1283-1287; Collins v. Hopkins (1923), 2K.B. 617, 34 A.L.R. 703, 705. In the Collins Case the English court said:

"Not only is the implied warranty on the letting of a furnished house one which, in my own view, springs by just and necessary implication from the contract, but it is a warranty which tends in the most striking fashion to the public good and the preservation of public health. It is a warranty to be extended rather than restricted."(Emphasis supplied.

See, also, Delamater v. Foreman, 1931, 184 Minn.

428, 239 N.W. 148; Ingalls v. Hobbs, 1892, 156 Mass. 348, 31 N.E. 286, 16 L.R.A. 51.

We have not previously considered this exception to the general rule. Obviously, however, the frame of reference in which the old common law rule operated has changed.

Legislation and administrative rules, such as the safeplace statute, building codes and health regulation, all impose certain duties on a property owner with respect to the condition of his premises. Thus, the legislature has made a policy judgment--that it is socially (and politically) desirable to impose these duties on a property owner--which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal liche, caveat emptor. Permitting landlords to rent "tumbledown" houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.

There is no question in this case but that the house was not in a condition reasonably and decently fit for occupation when the lease term commenced. Appellant himself admitted it was "filty," so much so that he lied about owning it in the first instance, and he testified that no cleaning or other work was done in the house before the boys moved in. The filth, of course, was seen by the respondents when they inspected the premises prior to signing the lease. They had no way of knowing, however, that the plumbing, heating and wiring systems were defective. Moreover, on the testimony of the building inspector, it was unfit for occupancy, and:

"The state law provides that if the building is not in immediate danger of collapse the owner may board it up so that people cannot enter the building. His second choice is to bring the building up to comply with the safety standards of the code. And his third choice is to tear it down."

The Tenants Choice of Weapons

1. The Tenants rights under the Housing Codes

It is possible that the tenant has a right directly against the landlord when there are violations of the housing code. The tenant's rights depend in part upon what sort of remedy he seeks. In general when the landlord had not lived up to the agreement embodied in the lease, the courts have held that the tenants only remedy was to get out of the lease and leave the premises. There was rarely a right to require the landlord to perform. However, there have been several types of statutes passed which have broadened the rights of the tenant.

If the tenants' complaint is covered by the housing code there are three general types of statues that offer remedies. They are rent abatement, rent witholding, and repair and deduct. Rent abatement statutes, contrary to the general rule, do offer the tenant a defense to eviction for non-payment of rent. Under these statutes a tenant may defend by proving the presence of housing code violations. Upon proof, the tenant is relieved of his obligation to pay rent until the violations have been corrected. The third statute gives the tenant the right to repair any code violations and deduct the costs of that repair from his rent. Some states also give the welfare department the right to withold rent payments to recipients where there are housing code violations. However, this sort of statute may result in reluctance of landlords to rent to welfare families.

It is important to understand that all of these remedies depend upon the "clean hands" of the tenant. The tenant, with the exception of nonpayment of rent, must not have acted in any way which would give the landlord some legal reason for eviction. This means that the tenant must not have ignored the rules of the building, must have complied with other conditions of the lease and must not be responsible for any of the conditions of which he complains.

The following cases and articles suggest various legal devices by which tenants may improve their housing conditions. Read the suggestions critically with a practical eye to their real possibilities and ramifications.

The evidence clearly showed that the implied warranty of habitability was breached. Respondents' covenant to pay rent and appellant's covenant to provide a habitable house were mutually dependent, and thus a breach of the latter by appellant relieved respondents of any liability under the former.

Since there was a failure of consideration, respondents are absolved from any liability for rent under the lease and their only liability is for the reasonable rental value of the premises during the time of actual occupancy. That period of time was determined by the trial court in its finding No. 9, which is supported by the evidence. Granting respondents' motion for review, we direct the trial court to find what a reasonable rental for that period would be and enter judgment for the respondents in the amount of their deposit plus the amount recoverable for their labor, less the rent so determined by the court.

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Tenant Unions: Collective Bargaining and the Low-Income Tenant*

More than 15 million people throughout the country live in substandard or deteriorating rental housing units.[1] Many municipal housing codes or state tenement-house laws declare such housing conditions unlawful.[2] But if the landlord chooses to ignore complaints, the tenant usually has no quick, effective remedy to compel even emergency repairs.[3] He can protest to the building department or initiate a costly, drawnout court proceeding.[4] Or the tenant can move--provided, of course, he can find another flat to rent.

In several Chicago apartment buildings, however, tenants now have an alternative: grievance machinery under a collective bargaining agreement between landlord and tenant union.[5] Recently, for example, a Chicago slum tenant discovered that several floorboards on his back porch had rotted through. The tenant reported the condition to the union grievance committee. Upon investigation the committee decided that the whole porch was about ready to go, and at its weekly meeting with the landlord asked him to replace the entire structure. The landlord denied that the porch was dangerous but suggested that he would fix it the following year. The committee was unimpressed; it demanded that the issue go to the arbitration board created by the collective bargaining agreement. The three-member board, composed of landlord and union representatives and a third person selected jointly by landlord and union, found the porch unsafe; but upon verifying the landlord's limited financial resources, it directed him to replace only floor boards actually rotting away. Had the landlord still refused to repair, the tenant-union members could have withheld their rent and paid their money instead into an escrow account, until either the landlord made the required repairs or the union could finance the work itself through the accumulating funds.

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*The footnotes have been edited and renumbered.

[1] This figure somewhat understates the situation. There are 5.3 million deteriorating or dilapidated occupied rental housing units in the United States. G. Beyer, Housing and Society 144 (1965). The average household in the United States has 3.8 people. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 35 (1966). These figures yield an estimate of approximately 18 million people living in substandard rental housing units. Most substandard housing is rented. C.f.B. Duncan & P. Hauser, HOUSING A. METROPOLIS--CHICAGO 84 (1960).

[2] See, Gribetz and Grad, Housing Code Enforcement: Sanctions and Remedies, 66 COLUM. L. REV. 1254, 1254-55 (1966).

[3] See, e.g., DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEPARTMENT OF JUSTICE AND OFFICE OF ECONOMIC OPPORTUNITY, TENANT'S RIGHTS 5-6 (1967) (hereinafter cited as TENANTS' RIGHTS); ILLINOIS LEGISLATIVE COMMISSION ON LOW INCOME HOUSING, FOR BETTER HOUSING IN ILLINOIS 21-22 (1967) (hereinafter cited as ILLINOIS COMMISSION); MASSACHUSETTS SPECIAL COMMISSION ON LOW-INCOME HOUSING, FINAL REPORT 64 (1965) (hereinafter cited as Massachusetts Commission).

[4] See pp. 1372-73 infra.

[5] "Tenant union," as it is used in this Note, refers only to a tenant organization which seeks a collective agreement with the landlord defining the obligations of both the tenants and the landlord. See TENANTS' RIGHTS 16-17

The alluring tenant union model has spurred the negotiation of collective bargaining agreements between tenants and landlords not only in Chicago but also in other cities across the country.[6] As yet no mass movement has developed because of the large effort required to organize a union and hold it together. But as early associations have gained experience, the sophistication of their contracts and of their negotiations with landlords has increased. In some cases landlord as well as tenant has come to appreciate the advantages of a stable tenant organization.[7] Even the federal government has recognized the institution.[8] Although few unions have been in existence long enough to justify any firm conclusions about their ultimate usefulness, their initial successes and failures suggest that they can play a significant role in some housing situations where other techniques are unavailing.

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[6] E.g., Chicago Sun-Times, Nov. 18, 1967, at 16, col. 1; Chicago Sun - Times, Nov. 17, 1967, at 12, col. 1; Wall Street Journal, Nov. 16, 1966, at 1, col. 1; TENANTS' RIGHTS 16-17; Glotta, The Radical Lawyer and the Dynamics of a Rent Strike, 26 GUILD PRACTITIONER 132 (1967).

[7] Letter from Joan Cole, Housing Coordinator, United Planning Organization in Washington, D. C., to the Yale Law Journal, Nov. 28, 1967; interview with John Condor, first major Chicago landlord to sign a collective bargaining agreement, in Chicago, May 3, 1967. But see Strauss, Tenant Unions: Special Privilege Outside the Law, 32 J. PROP. MANAGEMENT 129 (1967).

Public housing authorities have also begun to appreciate the value of tenant organizations. See NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, PUBLIC HOUSING IS THE TENANTS (Critical Issues, III) 27 (1967): letter from Van Story Branch, assistant director for housing management, Baltimore Urban Renewal and Housing Agency, to the Yale Law Journal, Nov. 30, 1967; Hearings on Proposed Housing Legislation for 1967 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess., pt. 1, at 642-43 (1967).

I. The Origins of Tenant Unionism

Tenant organizations are not exclusively the product of present conditions. As long ago as the 1890's, sever economic depressions and housing shortages triggered the formation of tenant groups.[9] In New York City, for example, the acute post-World War I housing shortage and the depression of the 1930's both produced large scale tenant organizations.[10] Such groups, arising in response to extraordinary conditions, sought and received temporary legislative palliatives such as moratoria on evictions as well as rent reductions.[11] Predictably, the organizations were short-lived; once the pinch had eased, they melted away. More recently, the grievances animating tenant organizations have shifted to the chronic ills of city slums: deteriorated housing, high rents, and absentee landlords. The most recent and well-publicized wave of tenant protests swept New York in 1964, when the massive rent strikes led by Jesse Gray gained wide publicity.[12] Even there, however, the tenant groups demanded only one-shot repairs from the landlord. Some tenants won, but even they must stare the whole struggle afresh as soon as another defect appears.[13]

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[8] The Federal Savings and Loan Insurance Corporation in its capacity as lessor of 84 foreclosed properties in Illinois signed a three-year contract with a newly organized tenant union. Chicago Sun-Times, Nov. 18, 1967, at 16, col. 1; the Department of Housing and Urban Development also approved a lease for a Muskegon, Mich., public housing project which recognizes a tenant union and establishes formal grievance machinery. Letter from Ronald Glotta, attorney for the East Park Manor Tenants' Organization, to the Yale Law Journal.

[9] Piven and Cloward, Rent Strike, THE NEW REPUBLIC, Dec. 2, 1967, at 11.

[10] W. Rudell, Concerted Rent-Withholding on the New York City Housing Front; Who Gets What, Why, and How?, May, 1965, at 20-28, 39-45, 61-63 (unpublished divisional paper in Yale Law School Library); see L. Post, THE CHALLENGE OF HOUSING 157-58 (1938).

[11] See W. Rudell, supra note 11, at 28-31.

[12] N. Y. Times, Dec. 31, 1963, at 1, col. 7; NLY. Times, November 2, 1963, at 37, col. 3; New York Times, September 28, 1963, at 1, col. 5.

The goals and tactics of tenant unions differ sharply from those of earlier groups. Their emphasis is on a stable organization dealing directly with the landlord on a continuing basis. Like a labor union, the tenant union begins by joining individual tenants into a cohesive association, and then negotiates an agreement with the landlord defining the obligations of both parties and providing specific procedures for the resolution of disputes. Although the similarities between tenant and labor unions are evident enough, tenant unions neither derive exclusively from the labor model nor represent so sharp a break with past landlord-tenant law as might appear at first glance. Tenant unions reflect the convergence of two developments: a trend in recent landlord-tenant statutes toward increased tenant participation inefforts to improve housing conditions, and the civil rights movement with its offspring, the war on poverty.

A. Remedial Statutes

The common law of landlord-tenant relations has long been incapable of dealing satisfactorily with the problems of private housing in an urban industrial society. Traditional notions of property rights have sharply restricted the tort liability of apartment house owners for even dangerously dilapidated structures so long as the tenants were in possession of the premises. In order to collect his rent the landlord had no obligation even to maintain the apartment in a habitable condition. By a relentless adherence to the doctrine that convenants in a lease are independent, the courts preserved the landlord's right to collect the rent even when he breached a written promise to repair. The courts conceded only the principle of constructive eviction to the tenant, but that relief was scant comfort except in the most outrageous circumstances. The common law, in short, gave the landlord the right to keep his property in whatever condition he desired. Its sole solution for tenant complaints was the right to terminate the lease and quit the premises.

Legislatures, however, have not regarded property rights with such awe. Slums are ancient phenomena, and statutes have long recognized that the public interest in adequate, safe, and sanitary housing conditions may override private property claims. In the late nineteenth and early twentieth centuries state legislatures responded to the inadequacies of the common law by enacting tenement-house statutes in an effort to set minimum housing standards. Over the next 50 years the early regulations evolved into the elaborate housing codes of today. But administrative enforcement of housing codes did not eliminate substandard housing; where the landlord's operation was profitable, fines for housing-code violations effectively amounted only to a tax on his business. Consequently, some states established receiverships, permitted welfare departments to withhold rents, or authorized public agencies to make emergency repairs with bills over to the landlord for costs.[14] The courts have consistently upheld such measures as valid exercises of the state police power.

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[13] The inadequacies of the rent strike which does not produce an organization capable of overseeing long-term reforms spurred two critics to call for more revolutionary measures. They urged tenants to refuse to pay any rent (to the landlord or into escrow) and thus to bring the system to its knees. Piven and Cloward, Rent Strike, NEW REBUBLIC, December 2, 1967, at 11, 13.

Until recently, most statutes could be enforced only at the initiative of an official arm of the government, either judicial or administrative. Now, however, tenant-initiated remedies are receiving increased attention because they are thought more effective. Also implicit in tenant-initiated remedies is a growing awareness that the tenant has a special interest in adequate housing in preserving the public health and welfare generally.

The earliest tenant-initiated remedies were the "repair and deduct" statutes which allowed individual tenants to withhold rent under carefully circumscribed conditions to repair significant defects in their apartments. Although such statutes did relieve the tenant somewhat from his total reliance on government action to protect his interests, the threat and effect of individual rent withholding were minimal.[15] In the past three years, Massachusetts and New York have passed provisions authorizing the tenant to rely on the legal process as sword rather than shield; he may initiate a lawsuit against the landlord to compel correction of dangerous housing conditions.[16] The New York statute is the first explicitly to legalize collective tenant action and establish its ground rules. Article 7A of the New

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[14] Note, Enforcement of Municipal Housing Codes, 78 HARV. L. REV. 801, 834-36 (1965); N. Y. Times, November 12, 1967, § 8 (Real Estate), at 1, col. 1.

[15] ILLINOIS COMMISSION 23; Note, Rent Withholding and the Improvement of Substandard Housing, 53 CALIF. L. REV. 304, 305 n. 4 (1965).

[16] N. Y. REAL PROP. ACTIONS LAW § § 769-82 (McKinney Supp. 1967); MASSACHUSETTS GEN. LAWS ANN. chapter 111, §§ 127C-H (1967).

York Real Property Actions and Proceedings Law[17] allows one-third of the tenants in a slum dwelling to petition for an order directing the landlord to repair conditions "dangerous to life, health, or safety" without a prior inspection by the building department; if necessary, the court may place the building in receivership.[18] Article 7A allows organized tenants an effective initiative to seek and obtain receiverships; the state, however, still insists on injecting itself into every landlord-tenant dispute by requiring a cumbersome, time-consuming, and expensive court proceeding.

B. Civil Rights and The War on Poverty

The emergence of tenant-initiated statutory remedies gave some impetus to the formation of tenant unions; another catalyst was the sudden popularity of community organization in the civil rights movement and the war on poverty. The herculean task of organizing apathetic slum residents has required organizers to focus on an issue that can catch and hold the interest of the poor. Housing is an obvious choice. Many of the original organizers of tenant unions hoped that the organization would expand into broadly based community and political groups.[19] While those hopes have yet to materialize, the effort to mobilize the poor for better housing has created, ~~at least~~ in some cases, a spirit of self-sufficiency and self-help.[20]

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II. The Economics of Slum Housing

The success of the tenant union will ultimately depend upon judicial tolerance of its activities, and upon its bargaining power with the landlord. But its potential for achievement must be guaged by the economics of slum housing. Improvement in the condition of slum housing requires either capital investment for rehabilitation or increased expenditures for maintenance and repairs. Without government assistance or higher rents, such funds can come from only three sources: economies that lower other operating costs, tenant labor, and the landlord's profits.

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[17] N. Y. REAL PROP. ACTIONS LAW, §§ 769-82 (McKinney Supp. 1967). See Note, Tenant Rent Strikes, COLUM. J.L. & SOCIAL PROB., April 17, 1967, at 2.

[18] N. Y. REAL PROP. ACTIONS LAW § 778 (McKinney Supp. 1967).

[19] Interview with Gilbert Cornfield, tenant union attorney, in Chicago, May 2, 1967; see NEWSWEEK, Jan. 31, 1966, at 24. Community organizing in the slums has not been successful, at least in Chicago, when it focused on politics. Cf. Cotton, *William Dawson Calls the Tune*, THE REPORTER, August 11, 1966, at 21.

[20] Interview with Charles Love, tenant union organizer, in Chicago,

A. Poor Tenants, Old Housing

Most proposals for improving slum housing focus single-mindedly on the landlord, but funds for maintenance may also be released by lowering operating costs. For while the landlord will resist vigorously if his profits are threatened, he should have no objection if better housing can be provided for his tenants without changing total expenditures. Because of the nature of slum housing, there is reason to hope that this can be done.

In the American city, housing for the poor is old housing. As a building ages, the pattern of income and expenses that it generates changes significantly. Operating expenses for heat, repairs, and janitorial services rise and rents fall. As the building moves toward its fortieth or fiftieth birthday, operating expenses often climb from 40 per cent of income to almost 60 percent.[21] In addition, keeping the building in adequate condition requires at least occasional capital improvements. In this respect a building is like a car: the older it becomes and the more intensely it is used, the more expensive it is to maintain.

Moreover, the slum tenant's rent covers more than "normal" operating expenses. The lessee who plunks down $35 for the week's rent pays for the right--and the right of his neighbors--to vandalize the apartment, to have large numbers of children jumping on the furniture, to live in illegally small apartments, to skip out without paying the preceding month's rent, to move frequently, and to pay in weekly installments. Vandalism, children's wear and tear, harassment by housing code agencies, rent skips, high turnover, frequent collections--all are costs that the landlord must cover by charging higher rent for less housing.[22] Since poor people by definition cannot afford to pay high cash rents, the landlord increases his price by offering fewer square feet of space and fewer services.

May 2, 1967. In Negro slums, a "black power" argument urging black tenants to help themselves and not to participate in tenant unions. Id. See generally M. CLINARD, SLUMS AND COMMUNITY DEVELOPMENT 124-28, 299-308 (1966).

[21] INSTITUTE OF REAL ESTATE MANAGEMENT, supra note 39, at 4. The selling price of a building usually does not fall to allow for increased maintenance costs. W. Grigsby, HOUSING MARKETS AND PUBLIC POLICY 234, 238 (1963).

[22] See G. STERNLIEB, THE TENEMENT LANDLORD 73-75 (1966) (hereinafter cited as STERNLIEB). A New Haven, Connecticut landlord estimated that

The tenants themselves, acting in concert through a tenant union, can help reduce the operating costs of housing. Tenants driven by personal frustration or anger at the landlord to vandalize or dump garbage in the hallway can be counseled and cajoled most effectively by other tenants. Organization itself can be a major solvent; many tenants do not bother to keep their building clean because they feel other tenants will tear it up anyway.[23] The existence of grievance machinery may break the vicious circle in which the tenant vandalizes his apartment in retaliation against the landlord's refusal to make repairs, and the landlord makes no repairs because the tenant vandalizes his apartment. In short, the union may be able to provide the supervision and incentive that presently characterize owner-occupied slum tenements--usually the best maintained buildings in the slum.

The tenant union may also be in a position to reduce the high rate of turnover and rent skips. One study has suggested that lack of sufficient space and complaints about present housing conditions motivate families to move.[24] Tenant union organizers believe that exasperation with specific defects causes many slum tenants to move, despite the knowledge that the new housing is likely to be as bad as what the tenant left behind.[25] Without hope of improvement in the present dwelling, however, a poor family will pick up and move anyway. Since a new landlord ordinarily requires a security deposit, a tenant

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he could reduce rents by 20 per cent if vandalism and turnover were substantially reduced. Speech by Herbert Cohen to Yale Law School seminar, No. 17, 1967. Public Housing for low-come tenants also faces these added costs. NATIONAL ASSOCIATION OF HOUSING AND REDEVELOPMENT OFFICIALS, supra note 8, at 27.

[23] Interview with Tony Henry, tenant union organizer, in Chicago, May 3, 1967; interview with five New Haven landlords in New Haven, Jan. 20, 1968. Tenants may have their own version of the prisoner's dilema. See generally Davis & Whinston, The Economics of Urban Renewal, in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 50, 54-57 (J. Wilson ed. 1966). The tenant union allows tenants to coordinate (and enforce) a mutual decision. See Id. 57.

[24] P. ROSSI, WHY FAMILIES MOVE 97 (1955).

[25] Interviews with Charles Love, Tony Henry, and Richard Rothstein, tenant union organizers, in Chicago, may 1-3, 1967.

often omits the last month's rent at the old apartment. By creating a sense of group participation among tenants in the management of the building, the tenant union might halt the constant movement from one substandard apartment to another.[26] Of course, to the extent that rent skips are the last resort of impoverished people spending money they do not have, not even the union can accomplish anything useful.

B. Tenant Labor

Besides cutting costs to the landlord, tenants can contribute their own labor to improve their living conditions. Informal, in-kind rent payments already occur in large areas of the slum housing market. Many landlords, for example, offer the new tenant a month's free rent if he cleans his own apartment when he moves in. Mutual distrust between landlord and tenant sharply limits the value of such agreements. The mere existence of the arrangements, however, suggests that they could become an additional "rent" payment plowed directly back into the building where lessor and lessee are both assured of adequate supervision. A tenant union can devise varieties of "sweat rent";[27] landlord, for example, might reduce the rent where the tenant repairs the apartment with landlord-supplied materials. Obviously, such arrangements will depend on the desires of the tenants. But if they want better housing and are willing to invest additional effort to get it, they should be allowed--if not urged--to proceed.[28] The tenant union remains the only feasible device to ensure the workability of tenant-labor plans.

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[26] See M. CLINARD, SLUMS AND COMMUNITY DEVELOPMENT 125-28, 299-308 (1966); NATIONAL ASSOCIATION OF HOUSING AND REDEVLOPMENT OFFICIALS, *supra* note 8, at 27, 37; Sas & Hiestand, *supra* note 26, at 873; cf. J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 270-90 (1961).

[27] Self-help and sweat equity plans have traditionally been associated with home building by future owners. *See* Nesbitt, "Self-Help" *Homebuilding*, 24 J. HOUSING 275 (1967); Wall St. Journal, Nov. 13, 1967, at 1, col. 1. In addition, sweat equity plans have been advocated for building low-income cooperatives or condominiums. See Davis Co. *Operative Self-Help Housing*, 32 LAW & CONTEMP. PROB. 409 (1967). Tenant unions may of course, prepare the way for cooperative or condominium ownership of buildings. Letters from Victor de Grazia, executive vice-president, Kate Maremont Foundation, to the Yale Law Journal, July 11, 1967; cf. Quirk, Wein & Gomberg, *A Draft Program of Housing Reform--The Tenant Condominium*, 53 CORNELL L. REV. 361, 390-93 (1968).

[28] Many tenants do make an effort to maintain apartments despite lack of cooperation from their landlords. Committee of the House of Representatives on Slum Housing and Rent Gouging. 74th Illinois General Assembly, Report June 1, 1965, at 4 (mimeographed) (hereinafter cited as Illinois Slum Housing Report). See TENANTS'RIGHTS 10.

C. Picking the Deep Pocket

The tenant union, of course, need not limit its goals to the housing improvements which can be financed through lowered operating costs or tenant labor. The landlord as investor and profit-maker represents the most obvious potential source of increased maintenance funds. The extent to which a landlord has profits to yield to a tenant union, however, will depend on several variables: the rate of return demanded by the landlord: the condition of the housing market; and the stage of deterioration of the building.

The ultimate constraint on the rewards the union can hope to win from the landlord is the rate of return the landlord requires to stay in the housing business. This required rate of return takes account of (1) the return presently available on safe investments, e.g., government bonds; (2) the probability that the property will continue to generate income; and (3) the property's liquidity (how easily it can be sold and the collateral value of the property).[29] Uncertainty about a steady flow of income, about the eventual ease of selling the property, and about the effort required to run the building will cause an investor to demand a high rate of return. Investors regard all rental housing as a risky investment, and slum housing is not only the most uncertain market, but the social disapproval attendant upon the epithet of "slumlord" tends to push the necessary rate of return even higher. The tenant union, if it can reduce come of these risks and uncertainties by stabilizing landlord-tenant relations, may be the only institution capable of exerting a downward pressure on the rate of return necessary to keep landlords in business.

In many instances, however, the landlord's profits exceed the return necessary to keep him from abandoning his buildings. Housing markets vary widely in different parts of the country. In some cities housing for the poor may be a dying industry,[30] but in a substantial proportion of slum markets demand outruns supply.[31] Even though the central cities have been losing their white population to the suburbs for nearly 20 years, inmigration of the poor--and chiefly the Negro poor--has replaced most of the fleeing middle class. Racial and social discrimination, as well as the more conventional disabilities of impoverished consumers, such as lack of knowledge, have kept the recent arrivals crowded into much smaller geographical areas than those deserted by middle-class emigrants.[32]

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[29] See Hollebaugh, Income Approach to Value in ENCYCLOPEDIA OF REAL ESTATE APPRAISING 54, 60-63 (E. Friedman ed. 1959); L. WINNICK, RENTAL HOUSING: OPPORTUNITIES FOR PRIVATE INVESTMENT 103-09. (1958).

[30] See, e.g., STERNLIEB 88-93, 103-06. Newark may be a special case, however, since it has one of the highest ratios of public housing units to population of any city in the country. More than ten per cent of Newark's dwelling units are in public housing developments. STERNLIEB 13-14. Despite a high vacancy rate rents in the slums do not fall. Rather they remain at the same high levels established when demand was high. A SCHORR, supra note 42, at 109; STERNLIEB 93, 225-26.

Not only is the demand for low-cost housing high, but the supply of low-cost housing is limited. Given the rents low-income people can pay, it is not economically feasible to build new units. Additional housing for low-income tenants becomes available as higher-income households vacate older for newer housing units. The older units then "filter down" to low-income tenants.[33] Even the limited housing made available by the filtering process is further restricted by "block patterning" which allows only buildings on the fringes of already-existing slums to filter down. In such a tight housing market, landlords often can increase rents without fear of losing tenants. Under these circumstances the tenant union should be able to attack the "spread" between the required rate of return and the rent charges based simply on what the market will bear.

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[31] The housing market is very fragmented; for example, large apartments able to house adequately the many large, low-income families of the slums are in terribly short supply in most slum housing markets. Interview with Tony Henry, tenant union organizer, in Chicago, May 2, 1967; interview with Elliott Segal, director, Division of Neighborhood Improvement, New Haven, Conn., in New Haven, Nov. 13, 1967. The vacancy rate in New York is still very low throughout the entire housing market. C. RAPKIN, THE PRIVATE RENTAL HOUSING MARKET IN NEW YORK CITY, 1965, at 9 (1966).

[32] J. ROTHENBERG, ECONOMIC EVALUATION OF URBAN RENEWAL 44, 45-46 (1967) (hereinafter cited as ROTHENBERG); MEYERSON, B. TERRETT, & W. WHEATON, HOUSING PEOPLE, AND CITIES 75-76 (1962); K. TAEUBER & A. TAEUBER, NEGROES IN CITIES, 24-25 166-69 (1965). The substantial rate of homebuilding during the 1950's reduced the rate of increase of overcrowding but did not halt it. K. TAEUBER & A. TAEUBER, supra, at 166-69. The high interest rates of the mid-1960's have severely reduced home construction, indicating that pressure on existing housing may increase again. Naylor, The Impact of Fiscal and Monetary Policy on the Housing Market, 32 LAW & CONTEMP. PROB. 384, 389 (1967).

[33] Filtering has become a much-debated concept. W.

If the structure of the slum market creates one opportunity for landlord profiteering, the rhythm of housing deterioration creates another. When a building first enters the slum market, it is a prime candidate for "milking", [34] that is, while in later years the building will require significant repair expenditures to stave off actual collapse during the period of descent the landlord need perform no maintenance work at all. The landlord may find it more profitable to collect the rents and milk the building as it deteriorates than to attempt to maintain his investment through repairs. In order to serve a low-

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GRISBY, HOUSING MARKETS AND PUBLIC POLICY 84-130 (1963). As used in the text, filtering refers to a change in occupancy. See id. 86. See also ROTHENBERG 38-39; A SCHORR, supra note 42, at 108-10.

[34] The decision to permit a building to deteriorate is often accompanied by a conversion of the building to Negro occupancy and a rise in the rent levels. In Chicago, one apartment complex displayed pratically this process clearly. Service was substantially reduced, rents were increased, and the landlord actively advertised for Negro tenants. Tenants' Action Council, Survey of Apartments at Old Town Gardens, May 1966 (copy on file at Yale Law Journal); testimony of David McCullough, Tenants' Action Council, before Illinois Commission on Low-Income Housing, Sept. 1967 (copy on file at Yale Law Journal). See N. GLAZER & D. MCENTIRE, STUDIES IN HOUSING AND MINORITY GROUPS 167-70 (1960); Note, Rent Withholding and the Improvement of Substandard Housing, 53 CALIF. L. REV. 304, 320 n183 (1965).

income market, the landlord must be permitted to reduce services somewhat; however, when a landlord attempts to extract huge profits in a short period of time by a cataclysmic change in maintenance policy, permitting the building to deteriorate rapidly and totally, the tenant union can attempt to reverse the policy without driving the landlord out of business.

Central to the landlord's financial ability to increase maintenance expenditures are his own skill in managing the building, the extent of his personal resources, and his own attitude toward his holdings. Discussions of tenant unions too often typecast all landlords as fungible villains. Actually, landlords fall into three general classes whose motive for owning and techniques of managing slum properties differ: the owner-occupant, the absentee professional, and the absentee amateur.

1. The Owner-Occupant

Owner-occupants constitute the largest group numerically; they usually control from one-third to one-half the buildings in deteriorating areas.[35] According to a ghetto cliché, the resident-owned structure is readily identified by the grass in the front yard in contrast to the barren dirt plot prickling with glass shards characteristic of the absentee-owned building. A recent study of Newark slums concluded that owner-occupancy is the best guarantee of a well-maintained building. The owner may be a white who has elected to remain in the building he owns or a middle-class Negro who finds that he can buy housing only in the slum; in either case, his presence in the building provides the interest in decent housing constant supervision, and day-to-day maintenance that old housing requires. The resident owner's investment of money and labor often is substantial. As a result most owner-occupied tenements do not need tenants unions. The resident landlord already provides adequate maintenance; pride of ownership has motivated greater effort in screening and supervising tenants. Tenant response to concerned resident landlords, moreover, is typically good; resident landlords, in marked contrast to their absentee cousins, rarely feel that their tenants cause problems.[36]

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[35] STERNLIEB 135. In the worst portion of Sternlieb's study area the percentage fell to 24 per cent, id., and in one of Chicago's worst slums some 18 per cent of the buildings were owner-occupied. COMMUNITY RENEWAL PROGRAM, CITY OF CHICAGO LAWNDALE: PART ONE 11 (1964).

Slum residents attracted by the American dream of owning their own home can, however, be drawn over their financial heads by unscrupulous real estate operators. Often two or three flat homes in slums or fringe areas are sold on land contracts or are financed through second mortgages taken back by the seller. Although the details and precise legal effects of these transactions differ, their practical effect is similar; almost no down payment is required, and the purchase price is often doubled the actual worth of the building. Typically the seller has tailored the monthly payments to his buyer, which is to say as high as the buyer can conceivably afford to pay. Rarely does the purchaser have any money on reserve for adequate maintenance. Such transactions have another attraction for the seller: responsibility for maintenance and housing code violations shifts to the unwary buyer. Not even the most militant tenant union confronting a resident landlord who is no better off than his tenants can hope to accomplish much.

2. The Absentee Professional Landlord

The main target of tenant union activity will be the absentee landlord. At the furthest extreme from the owner-resident is the large-scale slum specialist. Besides owning many buildings, the slumlord, at least in larger cities, tends to own the biggest ones. Therefore, large landlords while owning only 20 to 30 per cent of slum buildings often control up to 40 to 50 per cent of the dwelling units.[37] In dealing with the large landlord, the tenant union faces a businessman who, by virtue of his size, has access to capital, runs an integrated business, and is actively interested in improving his operation.

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[36] Sternlieb, *Slum Housing*: *A Functional Analysis*, 32 LAW & CONTEMP. PROB. 349, 352, n.3 (1967).

[37] Most figures on ownership are, unfortunately, tabulated by number of parcels owned instead of number of

Financing in slum markets is notoriously difficult to obtain; most legitimate financial institutions are reluctant to loan money into the slums.[38] When they do, they require the owner to sign personally. Thus approval of the loan often depends as much on the owner's personal credit as on the valuation of the property.[39] The consequence of this practice is the large landlords, once they have established themselves with a bank, find it easier to obtain money--and on better terms--than owner-

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dwelling units. In one Chicago neighborhood, one-quarter of the buildings contain one-half of the dwelling units. COMMUNITY RENEWAL PROGRAM, CITY OF CHICAGO, *supra* note 66, at 12. In most cases, these larger buildings are managed by large, professional landlords. Interview with Irving Gerick, Community Renewal Foundation, in Chicago, May 2, 1967; *see* letter from George Sternlieb to *Yale Law Journal* Dec. 6, 1967; cf. L. WINNICK, supra note 53, at 85 n.3.

[38] ROTHERNBERG 51; STERNLIEB 107-12; J. JACOBS, supra note 48, at 291-317. The credit that is available is more expensive than credit elsewhere. MASSACHUSETTS COMMISSION 68; *see* GRIGSBY, *Home Finance and Housing Quality in Aging Neighborhoods*, in THE ECONOMIC PROBLEMS OF HOUSING 105 (A. Nevitt ed. 1967).

[39] Interview with John Hackett, mortgage specialist, New Haven Redevelopment Authority, in New Haven, Nov. 9, 1967; *see* CHICAGO COMM'N ON HUMAN RELATIONS, supra note 72, at 10; W. NASH, RESIDENTIAL REHABILITATION: PRIVATE PROFITS AND PUBLIC PURPOSES 109 (1959).

occupants. The large holder also employs his own crew, writes his own insurance, and does his own capital improvements, thus realizing economies not available to the smaller owner. Finally, he is a businessman with an investment to protect; he is likely to respond with economic sophistication to sensible union proposals.

Limits to the ability of the large landlord to respond to tenant union demands do, of course, exist. The large landlord, like all real estate investors, wants to tie up as little capital as possible in any given building; he will seek to obtain 70, 80, or 90 per cent financing of the purchase price. Thus using the mortgage instrument as a leverage device, he can minimize his equity capital in any one structure and enable himself to multiply his holdings with a limited amount of capital. Nor is the practice by large-scale landlords of fully mortgaging their properties wholly undesirable from the tenant's point of view. Because debt capital carries an interest rate substantially less than the rate of return that an investor in the risky slum housing market demands on his own money, a high debt-equity ratio lowers the total rent the landlord must charge.[40] But the heavily mortgaged landlord loses flexibility since he must meet regularly recurring mortgage payments; in addition, just as his equity investment in any single building is small, his expected profit is small in absolute terms for each building. This factor can cause trouble for the union; one hundred dollars will not go far toward rehabilitating a tenement no matter whether it represents a five or a fifty per cent return to the investor. Nevertheless, the large landlord remains a tempting target because of his powerful financial position.

3. The Absentee Amateur

By contrast, the small absentee amateur owning only a few buildings is often a landlord more or less by happenstance and typically manages his own property with markedly less financial acumen than his professional counterpart. Often a marginal capitalist, the small absentee owner has few, if any, available sources of capital to put into the buildings;[41] the building's operation will be the main source of funds for additional maintenance expenditures. But the unique position of many small amateurs may make this source of funds fairly lucrative. Often the small owner used to live in the building and, although he moved long ago, still holds title. He may have inherited his holdings or otherwise become a fortuitous small-time investor. Due to his long continuous ownership, he may own the building outright with no outstanding mortgage;[42] when this is true, the rental income from the building will be potentially available for maintenance expenditures since the landlord has no mortgage payments to meet. If, however, the title holder faces heavy mortgage payments, the tenant union faces a bleaker prospect of obtaining meaningful concessions.

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[40] L. Winnick, supra note 53, at 107-108.

Furthermore, the amateur is likely to manage his building ineptly, or to be billed by large companies hired to repair or service the building for him. His primary desire is often for non-involvement; he wants only to collect the rent and wash his hands of the rest. The tenant union represents an excellent device to prevent such behavior and to insist that the owner reinvest some of the revenue generated by the building. The tenant union may, however, find the small owner less impressed by rational economic arguments than his large professional counterpart and therefore a harder individual to bargain with.

III. The balance of Advantage in landlord-Tenant Bargaining

A. Bargaining Power

Can the tenant union obtain housing improvements where more traditional legal remedies have failed? Even if the landlord has profits the loss of which will not drive him from the market, he will fight any effort to extract them. And even where the union seeks only to improve housing by lowering operating costs and contributing its own effort, it will have to convince the landlord that good faith bargaining is not against his interest. Whether the union will be able to lead the landlord to the negotiating table, and what it will obtain once there, will hing on the strength of the union, the type of landlord, conditions in the housing market, and the building's state of deterioration. The union derives its strength from the only source available to it: Collective action. To maximize its power, it must organize a significant proportion of the buildings owned or managed by the landlord it confronts.[43] Unless it can do so, the union probably cannot obtain the leverage to bring the landlord to the negotiating table.

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[41] Interview with R. Rothstein, Tenant Union Organizer, Chicago, Mar. 2, 1967.

[42] Interview with Meredith Gilbert, tenant union organizer, in Chicago, May 2, 1967. One of the longest tenant union rent strikes in Chicago was against an aged woman who owned nine buildings free of any mortgage obligation. Id. In Sternlieb's study, more than 15 per cent of the

Widespread picketing and rent withholding are the most potent forces to convince the landlord to bargain. Even if both tactics encounter no resistance in the courts, how likely are they to be effective? The landlord has three major weapons at his disposal to break a recognition drive by the union. Chief among them is eviction. A tenant union may be unable, as a legal matter, to prevent eviction of tenants who withhold their rent.[44]

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sample parcels showed no mortgage outstanding. STERNLIEB 108-10.

[43] Organizing all the buildings owned by one landlord instead of organizing individual buildings or blocks represented a sharp departure from traditional community organizing techniques. This important shift in tactics was recommended by labor union officials. Interview with Tony Henry, tenant union organizer, in Chicago, May 2, 1967.

[44] Even if the existence of a union rent withholding campaign would not constitute a valid defense to eviction for non-payment, the union may be able to halt any eviction on the basis of state laws.

The tightness of the slum housing market is obviously a prime determinant of the landlord's enthusiasm for evicting tenants. But even if the market is tight, the tenant union's numbers may give the landlord pause. Turnover is expensive, and the landlord may be reluctant to evict a significant portion of his tenantry even if replacements are clamoring at the doors.[45] The fact that the union is likely to include his more reliable and steady tenants should further stay his hand.[46] Most potent, however, is the expense attendant upon evictions by legal process, running anywhere from $50 to $100 a tenant[47] a substantial deterrent to wholesale emptying of the building.

Second, the landlord may simply cease to service his building. The threat of such action in a middle-class building might be compelling; but in a slum tenement total discontinuance of services may represent virtually no change from the status quo, particularly if the tenants have already been paying for all heat and utilities themselves. Even so, the landlord's refusal to provide any service or to make any repairs places a substantial burden on the tenants, who must then arrange to replace whatever minimal service the landlord used to offer. Of course, neither landlord nor tenant can be enthusiastic about the cessation of all service for any eriorate all the faster.

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[45] Precise costs are not available for private landlords, but ten years ago public housing officials estimated the cost of turnover at about $100 every time one family moved out and another moved in. PUBLIC HOUSING ADMINISTRATION, HOUSING AND HOME FINANCE AGENCY, MOBILITY AND MOTIVATION 5 (1958).

[46] The tenants most likely to join and work actively for the union are those most interested in better housing; from the landlord's perspective, these tenants are often the most stable and reliable. Interview with Tony Henry, tenant union organizer, in Chicago, May 2, 1967.

[47] The cost is calculated on the fees involved in cases where marshals must move a family out of an apartment. In Chicago, a landlord must pay eight dollars a room plus eight dollars a floor for every floor above the first. Fees for serving process and for mileage usually add another ten dollars per tenant to the total cost. Telephone interview with Evictions Section, Municipal Court

Third, and most drastically, the landlord may threaten to abandon the building or to take it off the market[48] --a threat made more credible if he has already stopped servicing the structure. Few landlords have carried through the threat to abandon, however, because such action not only forfeits all hope of profit, but also may entail a serious capital loss.

Against the tactics available to the landlord, the union can pitch its weapons of rent withholding and picketing. The former is likely to be the more potent; the landlord's need for a steady flow of rent money to meet mortgage payments will make him feel the pinch rapidly and painfully when his revenue is cut off.[49] But picketing, although not so powerful a tool as in the labor context, will also have its impact. Besides the social and political pressures on the landlord that inevitably accompany a strike, the publicity and discord it generates, especially when accompanied by a rent-withholding campaign, may stimulate the threat of a code enforcement crackdown which might be more drastic in its impact than the tenants' demands.

Such pressures, however, will not have the same impact on large and small landlords. Along with the larger landlord's greater potential for significant response goes

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of Chicago, May 3, 1967.

[48] Interview with Charles Love, tenant union organizer, in Chicago, May 2, 1967; cf. N.Y. Times, April 20, 1968, at 19, col. 3.

[49] While rent is withheld, the landlord confronts a steadily increasing enticement to settle from the growing escrow account of tenant rent payments.

the correspondingly greater capacity to resist. Beyond his willingness to test the staying power of the union, the organizers may have trouble recruiting and holding large numbers of tenants in many scattered buildings.[50] Small, highly mortgaged landlords, on the other hand, often acquiesce to union demands in fairly short order, though the concessions that the union wins may not be impressive. The small absentee landlord who owns his building free and clear is the one landlord who has been willing to let a union rentwithholding action drag on. His lack of personal or financial involvement in the building makes him the most difficult landlord for the union to bargain with.[51]

Housing market conditions will be an important determinant of the landlord's willingness to settle. In a tight market the landlord may be more willing to evict unionized tenants; a weak market, conversely, can induce the landlord to keep his present tenants and, therefore, to bargain with the union in good faith. The nature of the market may also work in the opposite direction, however, and unions may actually fare better in healthy ' housing markets where the owners look on themselves as the last holdouts in a dying industry.[52]

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[50] Locating most of the buildings owned by the same landlord is itself a difficult task. In addition, creating an organization with many scattered subunits poses more difficulties. Usually the success of the union depends upon finding one or two tenants who are willing to devote large amounts of time to organizing.

[51] One rent withholding action dragged on for nine months before the landlord, who owned nine buildings without any mortgages, agreed to negotiate. Interview with Meredith Gilbert, tenant union organizer in Chicago, 5-2-67.

[52] In either case, the landlord will not be eager to meet union demands. However, in a tight market, a landlord does not invest because he thinks it unnecessary, while in a weak market he fears for his investment. Therefore, in a tight market, a union could convince him that it was necessary to invest some of his profits in better maintenance.

The condition of the building will also determine the success or failure of union efforts. The building that has not yet deteriorated beyond hope of economically feasible rehabilitation holds the most promise. It does not require a major infusion of funds to provide decent, adequate housing for the tenants.[53] Here the tenant union will seek to ensure constant and continued maintenance. Some observers think the situation considerably bleaker in badly deteriorated tenements, there the union will probably accomplish little more than improved daily maintenance and greater responsiveness to recurring tenant complaints, but major improvements will be financially impracticable. Nonetheless, walls are better without holes than with them; minor repairs can make a significant difference in the habitability of an apartment.

Perhaps the single most important element in the ecnomics of tenant unions is the novelty of the institution and the attendant speculativeness of analysis. Many factors will determine the conditions under which the unions can function effectively. Without regard to theory, unions have sprung up in widely different circumstances across the country, from a low-income housing project in Michigan, to a middle income complex in Chicago, from the badly dilapidated West Side slums of Chicago to a series of one-family middle-class dwellings in suburban Harvey, Illinois. It is too early to conclude that tenant unions can exist only in certain economic environments but not in others; perhaps because their leaders forget to peruse the journals they have so far defied all such limits.

B. Lessons from the Past.

Even if the union's bargaining power brings the landlord to the conference table, the checkered history of legal efforts to improve slum housing might be thought to cast doubt on the tenant union's ability to obtain significant improvement of slum housing. But arguments based on the inadequacy of traditional legal remedies fail to note both the inherent limitations of earlier legal devices and the correspondingly greater potential of the tenant union.

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[53] Before a building has been allowed to deteriorate, the expense required to keep it in good condition does not appear to be significantly higher than the maintenance expense in a badly deteriorated building. STERNLIEB 77.

The irreversible nature of housing deterioration makes the tenant union an especially promising tactic against the landlord intent upon milking a presently adequate building. The process of deterioration is asymmetrical; it is easy to let a building go, but virtually impossible to reverse the process. Once the building has deteriorated substantially because maintenance requirements have been ignored, the building may cost more to rehabilitate than it is worth. Traditional legal remedies for inadequate housing have not been able to prevent the landlord from carrying out the decision to allow his structure to deteriorate into a slum tenement. The landlord will make token efforts to mask the deterioration taking place. Particularly because of the haphazard enforcement of such laws, by the time the building has clearly fallen below the minimal standards set by the housing code it will be too late.[54] The landlord has milked the building of the profits in it; only the badly deteriorated husk is left; the damage has been done with crushing finality. Legal action after the fact cannot force restoration of the building.

The tenant union, in contrast, can act early enough to prevent the landlord from profiting by his own inaction, before the structure is fatally blighted.[55] The union can negotiate for an acceptable standard of maintenance based on rent paid and earnings withdrawn.[56] Moreover, the tenant union builds on its own success. It creates machinery to bring continuing pressure to bear on the landlord, unlike traditional legal remedies where enforcement is intermittent at best and the time and effort involved in bringing a second code prosecution or rent-withholding action are the same as in the first.[57]

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[54] Both administrative and equal protection problems have prevented housing code enforcement agencies from achieving completely effective code complainance. Note "Enforcement of Municipal Housing Codes" 78 Harv. L. Rev. 801, 810-11 (1965)

[55] Ironically, of course, this type of building may be the most difficult to organize because tenants may not perceive the necessity for organizing. In one large apartment complex in Chicago, however, the tenants responded well to organizers since they clearly saw the buildings begin to deteriorate. . . Furthermore, middle-class tenants may prove easier to organize than very low-income families in badly deteriorated buildings.

Even where the building has deteriorated to the point that it cannot generate enough income to bring it up to code requirements, the tenant union enjoys an advantage over traditional legal remedies. Code prosecution and welfare receiverships set unrealistic goals for many buildings. Invoking administrative remedies precludes a strategy of flexibility and gradualism; to avoid the threatened sanction, the landlord must bring his building up to code requirements. Yet demanding all or nothing too often gets nothing. When the structure has already been milked, capital investment to meet requirements is simply uneconomical; the landlord will abandon the building rather than waste money upon it. Serious penalties, such as jail terms or high fines, have never materialized to deter this type of behavior. The tenant union on the other hand, can tailor its demands to the possible. Many tenant complaints fall far short of insistence upon major repairs; they look only for a few trash containers, janitorial service, locks on doors, mailboxes, or patching for the walls. Rehabilitation may be the ideal, but where it is unattainable a formalized procedure for handling complaints which the landlord can afford to remedy represents considerable progress.

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[56] The analogy to the labor union here is striking; if an employer claims economic inability to meet the union's demands, the Court has held that the employer must substantiate his economic hardship. NLRB v Truitt 351 U.S. 149.

[57] In old buildings, there must be constant supervision and maintenance. Even if court action produces repairs, the building may rapidly deteriorate unless maintenance is continuous.

IV. The Law of Tenant Unions

Most landlords have stoutly resisted tenant-union organization from the time the first leaflet was slipped into the tenant's mailbox until just before they signed on the dotted line; several have turned to the courts for help in resisting tenant organizing. Generally, the cases have been settled before a decision came down. Consequently, few opinions have indicated the tenor of judicial reaction to tenant unionism. But several lines of precedent exist to which courts are likely to turn for guidance in adjudicating the conflicts that arise between union and landlord at the various stages of union organization.

A. Organizing: The Foot in the Door.

At the outset union organizers canvass door-to-door and distribute leaflets to inform tenants of the union's activities and to recruit tenants for union meetings. The tenant's right to possession should protect such organizing activities from the landlord's attack on grounds of tresspass of invasion of privacy. Unlike the laborer who has no right to possession in the company-owned factory, the tenant in an apartment building has the right to receive anyone he desires in his leased premises.[58] In addition, he holds an easement or right-of-way over the common hallways even though the landlord retains possession there. Either an implied license arising from the existence of a bell in the front hallway or the "habits of the country", or an actual invitation to enter extended by the tenant will defeat the landlord's charge of tresspass.

B. Recognition: Purposes, Picketing, and Strikes.

Once organized the union typically has demanded that the landlord recognize it as the sole bargaining agent for the tenants and negotiate an agreement. With equal consistency, the landlord has refused, thereby precipitating a union campaign of picketing and rent withholding.

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[58] The tenant has the right to possession of the leased premises. 1 American Law of Property Section 3.38 (A Casner ed. 1952).

Judicial scrutiny of such tactics is likely to be extensive, and courts will undoubtedly turn to the labor precedents for guidance.

The broad first amendment right to picket enunciated in Thornhill v Alabama, 310 U.S. 88 (1940), sprang from the utility and effectiveness of picketing as a means of conveying and publicizing information. In the cases following Thornhill, however, the Supreme Court realized that patrolling pickets produced not only traffic problems such as blocking of sidewalks or entrances to buildings, but also coercion. Under proper circumstances, the Court held, the state could regulate both the traffic and coercion aspects of picketing despite its usefulness as a means of communication. . .

Even where picketing generates coercion--as it almost always does when the union pickets a business establishment-- the Supreme Court has carved only a specific exception to the scope of first amendment protection. The state may enjoin the picketing only where the object sought by the picketers violates a legitimate, clearly defined state law or policy . . .

Many tenants unions, however, have found that picketing alone does not bring the landlord to the bargaining table, and have also resorted to rent withholding. Without statutory authorization, the withholding stands on more uncertain ground than picketing. Landlords have a medly of theories on which they can seek to enjoin such union conduct: intentional tort; conspiracy in restraint of trade and interference with contractual relations.[59] . . . In defending rent withholding, the tenant union will find itself back in the thicket of the "unlawful purpose" doctrine and means-ends analysis prevailing in the picketing cases, but with no first amendment considerations to weigh in the balance . . .

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[59] F. Frankfutter & N. Greene. The Labor Injunction (1930) Where there is a statutory authorization for rent abatement or rent withholding, the tenant union can be on much firmer ground. The union can then bargain on the basis of the tenants' right to invoke the statutory procedures.

Meanwhile, as the lease actions or summary eviction proceedings drag on, both tenants and landlord come under strong pressure to reach an agreement. Neither can find the uncertainties and disadvantages of the strike situation attractive. Self-interest should move each side to negotiate, compromise, and settle on the basis of a realistic appraisal of the other party's economic strength.

C. The Collective Bargaining Agreement

The final negotiation of a collective agreement with the landlord represents the fruition of the tenant union's efforts. The contracts vary widely in sophistication, specific terms, and the number of buildings covered. The typical agreement contains the following provisions:

Substantive promises:
* a union commitment to encourage and oversee tenant efforts in responsible apartment maintenance;
* a landlord commitment to make certain initial repairs and to meet basic maintenance standards thereafter;
* a maximum rent scale for the life of the contract;
* a union commitment not to strike;

Enforcement provisions:
* machinery for regular transmission of tenant complaints and demands to the landlord;
* an arbitration board to resolve dispute over grievances with power to compel repairs;
* a procedure for rent withholding if the landlord fails to comply with the agreement;

Landlord-union relations:
* a landlord recognition of the union as exclusive bargaining agent;
* a landlord commitment not to discriminate against union members;
* a requirement that the landlord inform the tenant union of the addresses of all buildings owned and managed by him, and the names of all tenants as they move in.

Increasingly, collective bargaining agreements provide for a dues checkoff by the landlord.

Most important to the union is the landlord's acceptance of binding arbitration and the private enforcement mechanism of the rent withholding provision; their combined effect produces considerable economic pressure on the landlord to make necessary repairs rather than delay or take the matter into court. A Chicago tenant union that failed to include the enforcement provisions in its contract found itself little better off than if it had no contract at all. Under present common law the tenant can sue for damages for breach of a convenant to repair, but the expense and delay of legal action often deter litigation. A collective agreement with no private enforcement provisions simply trades one lawsuit for another. The landlord is under no incentive to act and may simply await litigation, knowing that it is unlikely to come.

In exchange for his promises the landlord receives a union committment to encourage responsible tenant maintenance of apartments. The union's promise is not empty, and in fact landlords have placed great reliance upon it. The potential for reducing vandalism and turnover played a large part in convincing several landlords to sign their first collective bargaining agreement with a tenant union. One landlord estimated that he could increase maintenance expenditures by 20 per cent if vandalism and turnover were reduced. It is still too soon to evaluate the union's effectiveness in promoting tenant responsibility, but after extended dealings with the unions, several landlords have come to look favorably on the prospect of their continued existence. As the union increases its control over the buildings, the tenants adopting a more proprietary attitude toward thier apartments, may take better care of them.

Tenants unions do not represent a panacea for the country's low income housing problem. No solution can be advanced without provision for large-scale infusion of money -- either public or private -- for rehabilitation and new construction. But even the most ambitious government proposals do not envision the construction of an adequate housing supply within a decade; realism suggests a considerably longer period before the country approaches its housing ideal. Interim steps are required, and the tenant union represents an alternative which may be beneficial to a variety of situations. There are, of course, circumstances where tenant unions will be of little use, as for example, where the landlord is as destitute as his tenants. But even where unions fail to attain their housing objectives, they have an equally important potential for creating better community organization in the slums.

While the tenant unions may be able to emerge intact from judicial scrutiny, legislation probably represents the best method of structuring the growth and formation of tenant unions. The real growth of labor unions did not take place until the Wagner Act had given labor organizations the stamp of legislative approval. Undoubtedly, legislative endorsement of tenant unions and settlement of housing disputes through collective bargaining would provide a substantial stimulus to the organization of tenants. Passage of landlord-tenant relations laws might go far to minimize the strife and friction so characteristic of present relations between the low-income tenant and his landlord.

Problem:

You have been selected as advisor for a tenants union. The building in which they live is owned by a middle income landlord who has three other buildings, one of which contains his own home. The tenants want to negotiate a new lease and ask you to draft one. Indicate the responsibilities of both the tenants and the landlord. Remember that part of the determination of success is whether or not you can get the landlord to accept it. Do not worry about using "legal" language. Simply state what duties and responsibilities each party has, and what methods of enforcement are open to each party. Finally, suggest what strategy you would use to get the landlord to negotiate with you.

DeKOVEN v 780 WEST END REALTY CO.
Cite as 266 N.Y.S. 2d 463

48 Misc. 2d 951

Felice DeKoven et al., Petitioners-Tenants, v 780 West End
Realty Co. et al., Respondent-Landlord and Mortgagee.

Civil Court of the City of New York, Trial Term, Part II.
Nov. 21, 1965

Action by 33 of 61 tenants for order directing deposit of rents into court for purpose of remedying alleged conditions dangerous to life, health, or safety. The Civil Court of the City of New York, Trial Term, Robert V. Santangelo, J., held that incidents of crime perpetrated by third parties within leased permises imposed no obligation on landlord to provide doorman service, especially in absence of contractual or statutory obligation therefore under Real Property Actions and Proceedings Law provision giving tenants of multiple dwelling the right to bring proceeding if condition dangerous to life, health, or safety exists.

Attorney for tenants directed to pay over to landlord all monies held by him pursuant to stipulation excepting rent due from tenant in a certain penthouse.

ROBERT V. SANTANGELO, Justice

Felice DeKoven, individually and on behalf of 32 other tenants of the premises 780 West End Avenue, Manhattan, brought suit against the landlord, 780 West End Realty Co., and the mortgagee, kings County Savings Bank, pursuant to Article 7-A of the Real Property Actions and Proceedings Law.

DeKOVEN v 780 WEST END REALTY CO.
Cite as 266 N.Y.S. 2d 463

The landlord, 780 West End Realty Co., instituted summary proceedings for nonpayment of rent against the 24 tenants of said premises. . .

A stipulation was entered into between the parties wherein the tenants consented to judgement in favor of the landlord in all the nonpayment proceedings, the attorney for the tenants to hold the rent in escrow, with a promise on the part of the landlord not to execute on those judgments until the final determination of the

Article 7-A proceeding. If the court decided in favor of the landlord in the Article 7-A proceeding, then the escrow money would be turned over to the landlord's attorney; if resolved in favor of the tenants, then the money would be used pursuant to the court's direction.

The proceeding brought by 33 of 61 tenants residing at 780 West End Avenue in the borough of Manhattan pursuant to the recently enacted Article 7-A of the Real Property Actions and Proceedings Law, prays for an order directing the deposit of rents into court for the purpose of remedying alleged conditions dangerous to life, health or safety.

266 NEW YORK SUPPLEMENT, 2d SERIES

Article 7-A provides that:

"One-third or more of the tenants occupying a multiple dwelling located in the city of New York may maintain a special proceeding as provided in this article, upon the ground that there exists in such multiple dwellings or in any part thereof a lack of heat or of running water or of light or of electricity or of adequate sewage disposal facilities, or any other condition dangerous to life, health or safety, which has existed for five days, or an infestation by rodents, or any combination of such conditions." (Real Property Actions and Proceedings Law, § 770.)

Petitioners specify that assaults, robberies and burglaries were committed in the building, 780 West End Avenue, as a proximate result of the respondent-landlord's failure to provide adequate protection for the residents of the multiple dwelling. More particularly, petitioners claim that the landlord's failure to provide around-the-clock doorman service seven days a week constitutes approximate and continuing danger to the life, health and safety of the tenants.

The court finds from the evidence presented:

1. There were sufficient incidents of crime to instill fear in the minds of these tenants, causing an unsafe feeling as to their persons and property.

2. During the past year assaults upon tenants, burglaries and larcenies have increased.

3. Police protection in the area was and still is inadequate, adding to the insecurity of the tenants. Accordingly, the court has no hesitancy in suggesting that the additional services of a doorman would lessen the number of crimes occurring within and around the building.

The question which this court must face, however, is whether § 770 of the Real Property Actions and Proceedings Law, which gives one third or more of the tenants of a multiple dwelling the right to bring the proceeding if a "condition dangerous to life, health or safety" exists, includes absence of a doorman as a "condition dangerous to life, health, or safety."

1. The court is of the opinion that incidents of crime, perpetrated by third parties within the premises, impose no obligation upon the landlord to provide doorman service, especially where there has been no contractual obligation or obligation imposed by statute to provide the same.

2. Criminal activity in the area of a multiple dwelling or within the premises itself was never contemplated by the Legislature under the provisions of Article 7-A.

3. An examination of the legislative findings and intent reveals that the primary reason for which Article 7-A was enacted was to provide additional remedies for enforcement of existing rights. Article 7-A is part of the Real Property Actions and Proceedings Law, a procedural statute, not a substantive act such as the Multiple Dwelling Law, and as such it neither created new substantive rights on behalf of tenants nor imposed additional obligations upon a landlord.

4. The intent of the Legislature is further clarified by examining the enumerated conditions which Article 7-A prescribes as dangerous to life, health or safety: they are lack of heat, running water or of light or of electricity or of adequate sewage disposal facilities or an infestation by rodents. Each of these enumerated conditions is the responsibility of a landlord under the Multiple Dwelling Law and each is the proximate cause of injury to the tenants. The lack of doorman service is neither. No obligation to provide such services is prescribed by the Multiple Dwelling Law or any regulation of the Rent Commission. Moreover, failure to provide such service is not the proximate cause of injury to tenants in the case of a crime perpetrated upon them by the intervening act of a person not in the employ of or agent of the landlord.

The question whether doormen should be furnished is a grave matter for the Legislater. Indeed, the last Legislatture passed laws to protect tenants from the high rise in the crime rate.

Section 35 of the Multiple Dwelling Law was amended to require owners of multiple dwellings to install lights on both sides of the front entrance way of the building and to have them lit from sunset to sunrise. (Chapter 496, Laws of 1965) Section 51-a of the Multiple Dwelling Law was enacted to provide for peepholes to be placed by the owner of a multiple dwelling in the door of every housing unit. (Chapter 493, Laws of 1965.)

However, the legislature failed to pass any law which in effect commanded or directed owners of multiple dwellings to provide doorman service.

This court cannot, under the present state of the law, direct the employment of doormen by owners of this multiple dwelling, now without such service.

Petitioners also specify the following conditions, alleged to be dangerous to the life, health and safety of the tenants:

a. "The public areas contain dirty halls, eroded and cracking walls and ceilings, a defective outer door, a defective elevator, a hole in the floor near the elevator, obsolete firehoses, inadequate garbage collection, vermin in the hallways and a window in the lobby is insecure and broken, all of which are a danger to the life and health of the tenants.

b. "The apartments in the building contain roach infestation, defective outer doors, defective windows, cracked and peeling plaster, defective and leaking plumbing, rotting floors, cracked sinks, obsolete plumbing facilities, cracked tiling, defective stoves, defective radiators, defective electrical outlets, insufficient heat and a leaky skylight, all of which are a danger to the life, health and safety of the tenants."

As a result of a petition to the Department of Buildings an emergency inspection of the premises was conducted. The inspector visited 90 per cent of the apartments and submitted a report to his superior. As of the date of the institution of this action, the landlord had not been notified of the inspector's findings.

The inspector reported 34 violations in 16 apartments as follows:

Violation	Number Found
Window cannot be readily opened	9
Repair tile floor in bathroom	4
Concealed leak	2
Inadequate supply of cold or hot water	2
Replace door saddle	2
Door not properly fitted	4
Replace glass in window	2
Plaster walls or ceiling in apartment	3
Repair flushing apparatus	1
Plaster wall in public hall	1
Repair door frame	1
Repair hole in wood floor	1
Repair waste stopped in bathroom	2

(5,6) From the testimony and from the court's own observations, obtained on an inspection tour of the premises which is discussed below, the court is convinced that the aforementioned conditions, found by the inspector, are not of such a magnitude, individually or collectively, as to constitute a danger to the life, health or safety of the life, health or safety of the tenants. Neither are the individual conditions sufficient to constitute a constructive eviction so as to bring the petitioners within the purview of relief afforded by Section 755 of the Real Property Actions and Proceedings Law.

The court visited the premises with the consent of the parties on November 11. The tenants' Committee and the tenants' attorney were present during the inspection along with a representative of the landlord. A newspaper reporter, a photographer and Congressman William Ryan were also in attendance. The court observed the public areas of the premises and also visited various apartments. There were plumbers on the premises attending to repairs of waste stoppage and flushing apparatus. Carpenters and painters were working to correct divers conditions throughout the building.

The public areas did not contain dirty halls, eroded and cracked walls and ceilings or vermin. The outer door and the elevators, alleged to be defective, were in proper working condition. The elevator had been certified as safe by the Department of Buildings on October 20, 1965.

The court upon inspection of various apartments found the windows in working order. There was no evidence of roach infestation apparent to the court nor was any such condition pointed out. The violations as to inadequate cold and hot water had been corrected.

At the trial there was testimony that the skylight in Penthouse B was in such a defective condition as to permit rain to leak into the living room of that apartment. The court inspected the skylight and found it to be in such a defective state and so informed the landlord. The continued existence of such a condition is a nuisance and a danger to the health of the tenants occupying those premises.

From the testimony at the trial and the court's own inspection of the premises the court is satisfied that the remaining defective conditions were not basically dangerous. There was no evidence offered that the self-service elevators used by the tenant were not in good running order, or were in any way dangerous to the life, safety or health of the tenants in their maintenance and operation.

The court was satisfied that the premises were adequately wired and approved by the Department of Water Supply, Gas and Electricity. No satisfactory convincing evidence was furnished that there was any dangerous condition from the electrical system installed in 1962. As a matter of record, the tenants admitted that upon the installation of adequate wiring in the entire premises, and in each apartment, the Rent Commission upon certification of the Department of Water Supply, Gas and Electricity granted the landlord an increased rental.

The court was also satisfied that the heating service was adequate, with the exception of a few radiators which needed new valves or the repairs thereof. There was no evidence that there was any water shortage or inadequate supply of water which would be dangerous to life, health and safety.

It appeared from the evidence that the landlord painted the apartments of the complaining tenants practically every three years. In the main, the list of complaints in the tenants' petition which were recited as dangerous to health, life or safety fell short of being proved by a fair preponderance of the credible evidence. Those defects which do exist are of a minor nature. They are not conditions dangerous to the health, safety or life of the tenants in this multiple dwelling.

The petition alleges roach infestation. There was evidence that roaches were found in one apartment. The evidence also indicated that the landlord supplied exterminator services at regular monthly intervals. The inspector testified that he found no infestation of roaches at the time of his inspection.

7. In the light of this court's findings, each and every tenant is legally in default in his refusal to pay the monthly rental due and owing to, and demanded by, the landlord, for the months of August, September and October. Judgement in favor of the landlord, is awarded in all the nonpayment proceeding except #87083. In that proceeding, because of the existence of a nuisance, as found by this court, the nonpayment proceeding is stayed until the nuisance is abated.

Accordingly, the attorney for the tenants is directed to pay over to landlord within five days after the date of this decision all monies held by him pursuant to the stipulation excepting that representing rent due from the tenant in Penthouse B, Mortimer Goldberg, and as to that he is directed to pay over the money to the clerk of this court within five days after the date of this decision.

"Rent Witholding and the Improvement of Substandard Housing"
53 California Law Review 304 (1965) by John C. Fossum*

....C. Housing Codes and the Failure of Adequate Enforcement

The traditional legal steps that a slum tenant may take in hope of forcing his landlord to make repairs have not proven helpful to the tenant nor have they been effective in improving the general conditions of slum areas. However, long before the emergence of modern concepts of the responsibility of the state for the welfare of its people, it was recognized that the public had an interest in maintaining sound and sanitary housing apart from the immediate effects of substandard dwellings on the occupants. Today the primary means of insuring the quality of the community's housing supply lie not in any legal remedies the occupants of the dwellings may possess, but in the regulatory powers of the states. The vehicles for this regulation are local building and housing laws. Building laws establish requirements to be met in new construction, while housing laws provide that the already existing units be maintained or improved according to certain standards.

There are three broad subjects covered by housing codes; requirements for installation and proper maintenance of necessary facilities, standard maintenance and sanitation requirements, and occupancy requirements controlling crowding within the units. The laws allocate responsibility for compliance between the owner of the building and the occupant. Usually the occupant will be assigned the duties of keeping his dwelling sanitary, making such repairs as are caused by his own neglect, and similar responsibilities of a "housekeeping" nature. The owner is responsible for making major repairs and keeping his buildings fit for human habitation. To the extent that housing codes exist in large numbers throughout the country, the adequacy of their enforcement will directly reflect the quality of maintenance of the housing supply. The available evidence suggests that after a slow start the adoption of local housing regulations has spurted rapidly within the past decade, and at the present time there probably is a substantial number of cities with housing codes in effect.

As the buildings in a city begin to show the signs of age and decay there is an increasing public recognition of the necessity for housing regulation. Thus the first significant laws establishing standards to be applied retroactively to existing housing were enacted near the turn of the century for the benefit of the large eastern cities. During the next two decades several states and cities enacted housing laws, most of which were based on Lawrence Veiller's Model Housing Law, published in 1914. The recent surge of housing law enactments was stimulated by the Federal Housing Act of 1954 which required the establishment of a "workable program ... to eliminate, and prevent the development or spread of, slums and urban blight" as a condition to a community's obtaining federal funds under the urban renewal program. The "workable program" requirement was interpreted by the Housing and Home Finance Agency as consisting of, among other things, a housing code enforcement plan. The 1964 Federal Housing Act will undoubtedly encourage the enactment of still more local codes by providing that the workable program prerequisite to grants-in-aid may now consist entirely of code enforcement, and by its requirement that there be in existence an effective code program for six months prior to application for federal funds.

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The codes are not doing the job that was expected of them, however, as the figures on the quantity of substandard dwellings in the cities demonstrate. As early as 1927 it was noted that even assuming the existence of a comprehensive, well drafted code, several factors often hindered its proper functioning: Lack of component personnel and sufficient appropriations in the administrative enforcement departments, overlapping of authority among the various agencies, inadequate minimum penalties for violations, and lax judicial enforcement.

A threshold problem with which nearly every housing law enforcement agency must deal is the lack of adequate administrative machinery and resources. Often there will not be sufficient personnel to make the regular inspections over a wide area necessary to discover existing violations. These area-wide surveys, as opposed to inspections occasioned by complaint, are important not only because they enable the department to act upon a maximum number of violations, but also because the haphazard complaint method debilitates the entire enforcement procedure. The owner who has been cited following a tenant's complaint will feel little respect for the law he has violated when the rest of his neighborhood remains untouched by it. Basically the problem is simply one of getting more funds available to the departments enforcing the codes. This requires that the community and the appropriating bodies be made aware of the prevalence and effects of substandard housing in order to create a sympathy with the purposes and needs of the department. Under the 1964 Federal Housing Act urban renewal grants are for the first time made available to communities to help defray the cost of expanded code programs. The new provision should be of material benefit in diminishing this obstacle to effective code enforcement.

A further administrative problem that hinders adequate housing code enforcement is the often overlapping jurisdiction of numerous enforcement agencies. This overlap tends to create confusion for the public as to which department handles a particular violation. It can also lead to duplication of inspections, and to an abdiction of responsibility by all agencies involved. Both inspections and the reporting of complaints would be simplified if enforcement were unified within one department. It has been argued that an agency should carry out enforcement only in those areas in which it has the requisite expertise, but this can be accomplished without abandoning the centralization of responsibility within one department. For example, in Los Angeles the building department has the primary responsibility for the administration of the housing code, but it may call upon the fire and health departments to make special inspections where expertise in these fields is required. While some satisfaction has been reported with the Baltimore plan of conducting area wide surveys by teams composed of members of the various departments involved in enforcement, the Los Angeles program appears to be more workable. Administration is unified under one department with the consequent advantage of efficiecy and certainty of responsibility, yet the system is flexible enough to provide for situations where the primary enforcing agency lacks the technical knowledge to conduct an adequate inspection.

A continued failure to comply with the standards set up in the housing codes after notice of the violation from the enforcing agency normally constitutes a misdemeanor, subjecting the violator to a fine or imprisonment. Too frequently, however, only minimal fines are assessed against the offenders, with the result that the slum landlord may prefer to absorb the slight penalty involved rather than undertake extensive repairs. A common explanation for this lax judicial attitude toward housing violations is that the trial judge who has been hearing felony cases all day is not easily convinced that the well-dressed gentleman before him is a criminal because he has not provided hot water for his tenants. Another reason given is that where the requirements of the code are unrealistically high the courts in recognition of this will enforce them leniently. Finally, it has been hypothesized that, when applying sanctions against the owners, the courts consider that the tenants themselves may have caused or contributed to the violations.

Several jurisdictions have attempted to solve these problems by the creation of special housing courts. Their advantage lies in acquainting a relatively small number of judges with the special problems of housing law enforcement, and in preventing the landlords from transferring their cases to the more lenient judges through continuances. The establishment of these courts would be particularly significant in large cities where there are many housing cases to be heard.

An additional response to the problem would be the establishment within the enforcing department of an administrative tribunal armed with the power of levy sanctions. These administrative hearings would offer several advantages. Assuming that the majority of violations will be finally disposed of there, the number brought to court would be reduced, resulting in more time for a careful preparation of those cases that are actually tried. They would also be valuable in cities where the volume of cases does not justify a full scale housing court. By handling most of the cases within the department the enforcement agency could maintain greater flexibility in dealing with offenders, and endure that the interests of the community would be given due consideration at the hearings.

Perhaps the most stubborn obstacle to the improvement of housing through code enforcement is the practical effect of strict enforcement: Often thousand of tenants would be thrown into the streets with no place to go. Faced with the need for extensive repairs the landlord may either raise the rent substantially, [83] or simply vacate the building and take it out of the housing supply. If either possibility occurs the effect will be to push impoverished tenants out into a market where adequate low rent housing is extremely scarce. As a consequence, displaced tenants would be forced to relocate in already overcrowded slum areas, or in improved areas but at the cost of spending a greater share of their income on housing, or in the hard-to-find public housing. The problem is aggravated by the absence of satisfactory relocation procedures in most areas. While there are statutory requirements that families displaced by urban renewal programs be adequately rehoused, no such guarantee exists for the tenant displaced by a routine enforcement of the local codes. In sum, while strict enforcement is desirable, even necessary, the enforcing agencies are faced with the prospect that the immediate effect of strict enforcement often may be to deprive a tenant of his home and merely face him into another slum.

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[83] There is reason to doubt that this result must always follow from requiring a landlord to make repairs. The idea that improvements will necessitate sharp increases in rent presupposes that landlords must pass their cost onto the tenants. This, in turn, raises the question of the profitability of slum rental units. Put more bluntly, are slum tenants being "gouged"? The available published figures on the ratio of income to investment in rental property are not conclusive, but many commentators and several isolated examples indicate that the return on slum tenements is very good indeed. Seligman, The Enduring Slums, in The Exploding Metropolis 120 (Editors of Fortune 1958); Slum-Makers are Shadowmen, 14 J. Housing 232 (1957). One critic has stated that a 30% annual return on the landlord's original investment is not unusual. Schorr, Slums and Social Insecurity 94 (1963).

These indications of profitability are bolstered by the opinions expressed in Vaughan, "Are Minimum Standard Apartment Houses a Good Investment?," The Apartment Journal, Dec. 1962, p.6. The author, apparently a Los Angeles investor well acquainted with dealings in rental accommodations, states that run-down apartments sell for from four to five and one-half times the annual gross income, as compared to "pride of ownership" property selling for six to eight times its gross income. Ibid. The danger with the former, of course, is that the profits may be eaten up by forced repairs. However, he goes on to state that "if you want capital gain with quick turnover, areas with 'clunkers' and high rent demand are hard to beat. I know operators who seek this type of property, depreciate it as fast as possible, sell it and get out and leave the next owner to face the music of the milked units. This type of operation takes nerve, judgement, time and knowledge and is not recommended for the ordinary investor." Id. at 15. The implication is clear that the "operator" who is impervious to the welfare of his tenants will profit handsomely from investment in slum apartments.

As the article above indicates, a primary reason for the profitability of slum property is that the purchase price can be retrieved through a rapid depreciation writeoff, precisely because it is old, poorly maintained, and thus has a short useful life. The owner buys the property, depreciates it quickly, preferably using a method of accelerated depreciation, then sells it and pays the lower capital gain rate on the difference between the sales price and the adjusted basis of the property. The whole operation encourages frequent changes of ownership and discourages sound maintenance policies. See Sporn, Some Contributions of the Income Tax Law to the Growth and Prevalence of Slums, 59 Colum. L. Rev. 1026 (1959). Some of the lucrativeness of this type of operating has been undercut by the enactment of Internal Revenue Code § 1250. This section provides that when depreciable real property is disposed of, all or a part of the gain may be treated as ordinary income for tax purposes. After the property has been held for one year the amount of the gain attributable to depreciation deductions in excess of those that would result under the straight line method of computation is taxed as ordinary income. However, this treatment does not apply if the property has been held for one year and the straight line method of computing depreciation is utilized; nor does it apply if the property has been held for ten years, no matter which system of computation is employed, since there is a declining percentage of the gain subject to the application of the higher tax, computed at 100% less 1% for every month the property has been held over twenty months.

There is a consensus of agreement that Negro tenants pay more than do white tenants for comparable accommodations due to the former's restricted market. See HHFA, Our Nonwhite Population 14; Millspaugh & Breckenfeld, The Human Side of Urban Renewal 11 (1960); Schorr, op. cit. supra at 84-85; Weaver, The Negro Ghetto 261 (1948); 1961 United States Comm. on Civil Rights Rep. bk 4, at 1;

Cooney, "How to Build a Slum," The Nation, Feb. 14, 1959, p. 140. It is claimed that Negroes in Chicago are paying $73 million a year because of their limited housing market. Benedict, Civil Rights and Racial Unrest--A Lawyer's Problem, 45 Chi. B. Record 225, 226 (1963).

In New York City this question of the profitability of slum housing has a unique feature because most of the low rent housing there is still subject to rent and eviction control. Landlords are guaranteed a net annual return of 6% computed without deduction for mortgage interest or allowance for depreciation in excess of 2%, New York, N. Y., Administrative Code § &51-5.0 (g) (1) (a) (1963), but they claim the rates set by the Rent and Rehabilitation Agency are not sufficient to permit them to undertake extensive improvements called for by the Multiple Dwelling Law. These claims were apparently substantiated to some extent when in 1964 the New York Real Estate Commissioner released the results of a study undertaken on the costs to the city of improving and operating 18 buildings taken into receivership by the city. The commissioner reported that 13 of the buildings would never pay for themselves and the remaining 5 would do so only over a long period of time. N. Y. Times, Feb. 12, 1964, p. 1, col. 1.

New York currently provides tax incentives for making repairs that remove housing violations in certain classes of dwellings. Any increase in the assessed valuation resulting from improvements eliminating building violations is exempt from local taxes for 12 years. Furthermore, the total tax on the buildings and land is reduced each year for 9 years by an amount equal to 81/3% of the value of the improvements. New York, N. Y. Administrative Code § J51-2.5(c) (1963). These incentive provisions are almost necessary in New York with its combination of rent control and an acute housing shortage that neither stimulates low rent construction nor allows the city to take the substandard units off the market through demolition. They would probably be desirable in other cities with similarly intransigent problems with slum housing. However, the loss in municipal revenue must be weighed against the value of the tax reduction as an inducement to removing the violations. Furthermore, it would seem that unless the problem is widespread there is no need to reward the landlord for merely complying with a legal duty. Nevertheless, New York and cities with like problems can and should use this device along with any other means in attempts to either coerce or induce compliance with the housing laws.

In the event these tax incentive devices do not persuade the landlord to make the repairs, it is not overly harsh even in New York to require repairs or to take the property into receivership, since it was through the previous delinquency of the owners that the buildings were allowed to get into such an extreme state of disrepair. This conclusion applies a fortiori to slum housing in other cities in light of the probability that the owners have in the past been reaping large profits from the property at the expense of their tenants' well being.

It is within this context that the rent strike has appeared. The slums in the central cities are becoming occupied predominantly by Negroes and other minorities. Not enough new dwellings are being constructed to house these people at prices they can afford. Minimum building and health standards have not been maintained in existing housing. The sum of these factors equals yet another item on a long list of the Negro's grievances. During a time when Negroes are reacting with some form of direct action against all manner of discriminatory treatment, real or supposed, it is not surprising that the rent strike too has been used. Thus, tenant initiated rent withholding today has close connections with the Negro civil rights movement, and the existing civil rights groups have supplied many of the leaders of the strikes as well as the inspirational impetus of a dynamic cause. The result is that the temper of the times lends a dedication to the participants in the rent strikes that promises this tactic will be used further in the times to come.

Rent Withholding in New York City

A. The Tenant Initiated Rent Strikes

The wave of rent strikes that occurred during the winter and spring of 1963-64 originated in New York City. Since New York has the largest number of nonwhites of any city in the United States, and the tenements in the Negro districts there are among the most dilapidated and overcrowded in the country, it was a natural birthplace. Significantly, at the heights of the strikes the majority were organized in predominantly Negro sections of the city. But more importantly, New York City provides a favorable statutory framework upon which the rent strikes could be based. First, widespread rent and eviction control protects the rent paying tenant from arbitrary eviction upon the termination of his lease. And second, Section 755 of the New York Real Property Actions and Proceedings Law provides that if housing violations which are serious enough to constructively evict the tenant have been recorded with the appropriate New York City agencies, a court may stay eviction proceedings brought for nonpayment of rent upon the tenant's deposit of the amount due into court. When the requisite repairs have been made the landlord is entitled to all of the back rent. In many of the rent strike cases this proved to be a safe legal basis for withholding rent from the landlords. However, the standard of "constructive eviction" is vague, and cases with similar facts were often resolved differently, apparently varying with the predisposition of the judge trying the case.

In Gombo v. Martise, a case that received some publicity when it was decided, the trial court went around and considerably beyond the statute by declaring that when violations exist in a dwelling that are a hazard to life and limb the tenant is entitled to a full refund of his deposit made to the court, and until the repairs are made he is not obliged to pay rent to anyone. The opinion characterizes such hazardous violations as constituting a "partial eviction," relying on Judge Cardozo's opinion in Fifth Ave. Bldg. Co. v. Kernochan. In that case the court permitted the tenant to remain in possession of part of the leased premises without paying any rent, but the court made clear it was dealing "with an eviction which is actual and not constructive."

The trial court's decision in Gombo v. Martise has been overruled, but there has been considerable support for the basic idea behind the Gombo decision-- that tenants should not have to make any rental payments so long as their apartments are in a dangerous or unhealthy condition. In the 1964 New York legislative session, nine separate bills were introduced all of which, if passed, would allow tenants in seriously substandard accommodations to withhold their rent, and, upon their landlord's continued failure to make required repairs, to either keep the money with no further obligation or apply it directly to the necessary repair work. The feeling behind these proposals is that Section 755 or the Real Property Actions and Proceedings Law is not an adequate stimulant to prompt repairs because the landlord knows he will eventually get the withheld rent. It is also believed that section 755 is too restrictive in not allowing the courts any freedom in releasing the money deposited to either the landlord or the tenant in order to allow him to make essential repairs, or in crediting the tenants with expenditures for necessary repairs actually made by them. One of the most workable of the new bills, the perhaps the one with the best chance to be enacted, is the joint proposal of the New York City Bar Association and the Community Service Society of New York. Its principal virtue is that it discards the existing prerequisite to rent withholding under section 755, "conditions constituting a constructive eviction," and substitutes for it the test of a "rent impairing violation," defined as "a condition in a multiple dwelling which....constitutes, or if not promptly corrected, will constitute, a fire hazard or a serious threat to the life, health or safety of the occupants." The department in charge of enforcement would be empowered to promulgate a list of specific violations serious enough to be designated rent impairing. Subsection 3(a) of the bill provides that when a rent impairing violation has been recorded and verified by the enforcing department, notice to that effect will be sent to the owner, and if the condition goes uncorrected for six months following the notification, the tenant will owe no duty to pay rent for as long after the six months period as the violations remain. Under the present test of constructive eviction tenants are forced to gamble on how a court will interpret the term, and run the risk of eviction for nonpayment of rent if the court fails to give the phrase the same meaning as do the tenants. It is an unnecessary hardship to force the tenants to correct this by enabling the enforcing department to clarify for the tenants, the landlords, and the courts under just what circumstances the rent may be withheld. Safeguards for the landlords have been drafted into the bill: In a suit for back rent the tenants cannot raise the statute as a defense if they themselves caused the violation; the rent must be paid into court while the action for rent is pending; and costs and attorney's fees not exceeding one hundred dollars are to be paid by the tenants if they should raise the defense in bad faith.

A fundamental weakness in the bill is the excessively long period that the tenants must endure conditions that concedely constitute "a fire hazard or a serious threat to (their) life, health or safety" before invoking the sanction of rent withholding. Surely a month to six weeks would be sufficient time for the landlord to either complete the repairs or make such progress as to evidence a bona fide intention to do so. Any inconvenience caused to the owner by requiring prompt action must be considered in light of the hazardous conditions which the tenants must endure pending his taking action.

Unfortunately, either the New York City Bar-CSS sponsored bill nor any of the other rent withholding proposals were enacted during the 1964 session. The City Bar-CSS proposal has been amended, however, to provide that it will be effective only for a period of two or three years, and if then found to be satisfactory will be renewed. As amended the bill is expected to be reintroduced at the 1965 session, and its proponents are hopeful of enactment. If the proposal is enacted with the recommended shortening of the period between notice to the landlord and the time when the tenants may withhold their rent, it will be a significant addition to the present arsenal of weapons available to coerce compliance with the housing laws. An indication of what its worth might be is shown by the past successes of the use of rent withholding under the less coercive provisions of section 755. Under the proposed statute the pressure on the owner to make required improvements would be direct and immediate, without the delays often evidenced in proceedings to impose criminal penalties on the landlord. Moreover, there would be far less uncertainty over the nature and amount of the penalty than is inherent in present sanctions: If sufficiently threatening violations are certified by the inspecting department to exist in a unit then the landlord will not be able to collect any rent from the tenants for as long as the violations remain after he has been given a reasonable time to make the needed improvements. The only uncertainty to be litigated might be whether the tenants themselves caused the violation. Perhaps the strongest argument for legalizing rent withholding, however, is that where used it may divert a potentially explosive situation into manageable channels. When the failure of official enforcement of the minimum housing standards in an area has precipitated discussion of the advisability of enacting rent strike legislation, the tenants' dissatisfaction with their deplorable living conditions has understandably grown to great proportions. By providing the tenants with an orderly, yet effective, and directly accessible means of attempting to improve their living conditions, the city and state may be able to avert more militant expressions of protest.

Comment: "A proposed new remedy for tenants of slum buildings. "Slumlordism as a Tort." Sax and Heistand, Michigan Law Review 65:869, March 1967.

Two legal writers have recently suggested that the failure of all existing remedies to clear up the abomnible housing of the slums is clear to anyone who drives through an urban area, and that some new legal remedy must be found to do the job. They suggest making slumlordism a tort. In other words, holding the landlord of a slum dwelling as liable for the harm it causes to the tenants as we hold any other person legally liable for the injury that he causes to another.

Sax and Heistand find four weaknesses in all of the remedies presently available to tenants. First, they are essentially remedies which require public enforcement, "leaving out that critical party, the tenant." Secondly, no remedy provides for damages to the slum tenant for the harms that he has suffered. Third, the remedies all ignore the possible culpability of the tenant. (which the author suggests is "smacking of paternalism.") Finally, it is impractical economically to expect that the landlords will rent to low income tenants after expending money to bring their building to housing code standards.

The tort road seems, to them, to avoid many of the hazards of the old remedies. Most importantly it allows the tenant to get redress for his grievances without the necessity of involving the public agencies. Too, it places the burden of responsible tenancy squarely on the shoulders of the urban tenant for he must not have done any counter harm to the landlord (in the form of defacing the building for example) if he is to succeed in his own action.

Perhaps the most persuasive part of their article is in their insistence that the legal process recognize two points. First, that "slumlordism is an intentionally inflicted tort." That is, that the landlord's negligence is itself a form of harmful action.* Secondly, they feel that the tort remedy offers an opportunity for the legal process to recognize the immense emotional distress inflicted upon the slum dweller. "The man who tricks a crazy little old lady into believing that she has discovered a pot of gold at the end of the rainbow receives the profound attention of the courts, but the thousands of landlords who daily subject their tenants to life in rat and garbage infested tenements with no heat in the winter, no ventilation in the summer, seem to have been completely ignored." (At. page 832)

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* That is not to suggest, however, that the slumlord is a "conscious willing evil doer."

The authors, however, do not explain why forcing the landlord to pay damages won't also be considered a business expense to be passed on to other tenants. Or how to combat the possibility that a harrassed landlord will simply abandon his building, and dehouse the occupants. For a rebuttal to the proposal, which suggests that the receivership for slum buildings is a better route see, "Slumlordism as a Tort: a Dissenting View.:" Blum and Dunham. Michigan Law Review 66;451, January 1968.

IV. Retaliatory Eviction

BROWN v. SOUTHALL REALTY COMPANY

District of Columbia Court of Appeals
237 A. 2d 834 (1968)

QUINN, Judge.

This appeal arises out of an action for possession brought by appellee-landlord, against appellant-tenant, Mrs. Brown, for nonpayment of rent. The parties stipulated, at the time of trial, that the rent was in the arrears in the amount of $230.00. Mrs. Brown contended, however, that no rent was due under the lease because it was an illegal contract. The court held to the contrary and awarded appellee possession for nonpayment of rent.

Although counsel for appellant stated at oral argument before this court that Mrs. Brown had moved from the premises and did not wish to be returned to possession, she asserts that this court should hear this appeal because the judgment of the court below would render certain facts res judicata in any subsequent suit for rent. In Bess v. David, supra, a suit by a landlord against a tenant for recovery of rent owed, defendant contended that he did not owe rent because he was not a tenant during the time alleged. The defendant was, however, denied that defense, this court stating on appeal that '* * * we think *any* question of appellant's tenancy is foreclosed by the judgment in the previous *possessory* action." (Emphasis supplied.) 140 A. 2d 317.

(1) Thus, because the validity of the lease and the determination that rent is owing will be irrevocably established in this case if the judgment of the trial court is allowed to stand, we feel that this appeal is timely made.'

Although appellant notes a number of errors, we consider the allegation that the trial court erred in failing to declare the lease agreement void as an illegal contract both meritorious and completely dispositive, and for this reason we reverse.

The evidence developed, at the trial, revealed that prior to the signing of the lease agreement, appellee was on notice that certain Housing Code violations existed on the premises in question. An inspector for the District of Columbia Housing Division of the Department of Licenses and Inspections testified that the violations, an obstructed commode, a broken railing and insufficient ceiling height in the basement, existed at least some months prior to the lease agreement and had not been abated at the time of trial. He also stated that the basement violations prohibited the use of the entire basement as a dwelling place. Counsel for appellant at the trial below elicited an admission from the appellee that "he told the defendant after the lease had been signed that the back room of the basement was habitable despite the Housing Code Violations." In addition, a Mr. Sinkler Penn, the owner of the premises in question, was called as an adverse witness by the defense. He testified that "he had submitted a sworn statement to the Housing Division on December 8, 1964 to the effect that the basement was unoccupied at that time and would continue to be kept vacant until the violations were corrected."

This evidence having been established and uncontroverted, appellant contends that the

lease should have been declared unenforceable because it was entered into in contravention to the District of Columbia Housing Regulations, and knowingly so.

Section 2304 of the District of Columbia Housing Regulations reads as follows:

> No persons shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin.

Section 2501 of these same Regulations, states:

Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of the Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premise or neighborhood healthy and safe.

(2) It appears that the violations known by appellee to be existing on the leasehold at the time of the signing of the lease agreement were of a nature to make the "habitation" unsafe and unsanitary. Neither had the premises been maintained or repaired to the degree contemplated by the regulations, i.e., "designed to make a premises * * * healthy and safe." The lease contract was, therefore, entered into in violation of the Housing Regulations requiring that they be safe and sanitary and that they be properly maintained.

In the case of Hartman v. Lubar, 77 U. S. App. D. C. 95, 96, 133 F. 2d 44, 45 (1942), cert. denied, 319 U. S. 767, 63 S. Ct. 1329, 87 L. Ed. 1716 (1943), the court stated that,

" the general rule is that an illegal contract, made in violation of the statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer." The court in Lloyd v. Johnson, 45 App. D. C. 322, 327 (1916), indicated:

> To this general rule, however, the courts have found exceptions. For the exception, resort must be had to the intent of the legislature, as well as the subject matter of the legislation. The test for the application of the exception is pointed out in Pangborn v. Westlake, 36 Iowa 546, 549, and approved in Miller v. Ammon, 145 U. S. 421, 426, 36 L. Ed. 759, 762, 12 Sup. Ct. Rep. 884, as follows: "We are, therefore, brought to the true test, which is, that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the subject matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the court will so, hold and construe the statute accordingly."

(e,4) Applying this general rule to the Housing Regulations, it may be stated initially that they do provide for penalties for violations. A reading of Sections 2304

> And 2501 infers that the Commissioners of the District of Columbia, in promulgating these Housing Regulations, were endeavoring to regulate the rental of housing in the District and to insure for the prospective tenants that these rental units would be "habitable" and maintained as such. The piblic policy considerations are adequately stated in Section 2101 of the District of Columbia Housing Regulations, entitled "Purpose of Regulations." To uphold the validity of this lease agreement, in light of the defects known to be existing on the leasehold prior to the agreement (i.d., obstructed commode, broken railing, and insufficient ceiling height in the basement), would be to flout the evident purposes for which Sections 2304 and 2501 were enacted. The more reasonable view is, therefore, that where such conditions exist on a leasehold prior to an agreement to lease, the letting of such premises constitutes a violation of Sections 2304 and 2501 of the Housing Regulations, and that these Sections do indeed "imply a prohibition" so as "to render the prohibited act void." Neither does there exist any reason to treat a least agreement differently from any other contract in this regard.
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> This, for this reason and those stated above, we reverse.
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> Reversed.

Brown v. Southall Realty was noted in 56 Geo. L. J. 920-30 (1968); 66 Mich. L. Rev. 1753 (1968); 30 U. Pa. L. Rev. 134 (1968); 25 W. & L. L. Rev. 237 (1968); 18 Catholic L. Rev. 80 (1968). 21 Vand. L. Rev. 1117 (1968); 4 Harv. Civil R. Civ. Lib. L. Rev. 204 (1968).

The implied covenant of habitability created in Brown by reason of Section 2304 of the D. C. Housing Regulations related only to the condition of the premises at the time of the original leasing. A few months later the same court limited Brown to situations where the housing code violations were alleged and proved to have been in existence prior to the original leasing, even though Section 2510 of the Regulations states that the premises "shall be kept in repair." Saunders v. First National Realty Corp., 245 A.2d 836 (D. C. 1968). Perhaps the thought here is that unhabitable conditions in the leased premises (as opposed to other parts of the buildings) arising after the beginning of the leasing are in general more likely to be the fault of the tenant, his family and invitees as opposed to gradual deterioration and destruction by others. But this estimate will often be wrong and a quick examination of the facts of the particular conditions complained of and the length of time in which the tenant has been in possession would probably establish this. Accordingly a straight rule that conditions occurring after the beginning of the tenancy will not be considered is unnecessary to prevent tenants from remaining in possession while withholding rent on the ground that the landlord has not repaired conditions for which the tenant is directly or indirectly responsible. Tenants probably need greater protection in compelling the landlord to repair conditions not their fault than they do in insuring that the premises are habitable at the time of the original leasing when, in many situations, the prospective tenant can refuse an offered apartment in favor of one in better condition.

Problem: What happens to the tenant who defends eviction using Brown v. Southall?

The Brown v. Southall Realty decision poses a number of problems in defining the relationship of the landlord and tenant operating without a legal lease of any sort. In the following problem, suggest arguments for both sides and then write an opinion as the judge deciding the matter.

In both roles write memorandums which solve the problem without doing violence to Brown v. Southall.

Mrs. MacTenant agreed to rent an apartment for $90 a month from Ernest Esquire. The lease was an oral one. The apartment had esposed wiring, leadbased paint, and no hot water. These conditions were known to Esquire before he entered into the lease with Mrs. MacTenant. After five months, Mrs. MacTenant stopped paying her rent. After two months during which he received no rent money from Mrs. MacTenant, in spite of repeated requests to pay, Mr. Esquire filed suit for possession of the apartment. The defendant tenant successfully defended the suit on the grounds that the lease was void and invalid since it was entered into in violation of the housing code of the City which stated that no one was allowed to rent housing which was in violation of the standards set in the code. Following the loss of the eviction suit, the landlord filed a second suit claiming that since there was no contract between them, Mrs. MacTenant was not a tenant, and so was a trespasser and should be removed from his property immediately. There is a stature operating in the city which requires that the landlord, except for nonpayment of rent, be required to give the tenant the same amount of notice (in an oral lease) to quit the premises, as the time between rental periods. (30 days notice for monthly rental payments, 7 days if payment is by the week.)

Edwards v Habib
397 F2 687 (1968)

This is an action by landlord for possession of a house rented on a month to month lease.

The lower court decided in favor of the landlord. The D. C. Court of Appeals reversed and remanded.

Facts: Defendant—tenant rented a house from the landlord. Shortly thereafter she reported housing code violations which the landlord had refused to remedy at her request, to the Department of Licenses and Inspections. The inspection revealed 40 violations which appellee was ordered to correct. Appellee then gave his tenant 30 days (required by the D. C. statute for month to month leases) to vacate.

Mrs. Edwards, the tenant, defended against the eviction by alleging that the eviction was in retaliation for her complaints to the housing authorities.

The court, after a brief but not dispositive discussion of constitutional issues, deals with the case in the following opinion, Judge J. Skelly Wright for the court:

.... III

But we need not decide whether judicial recognition of this constitutional defense is constitutionally compelled. We need not, in other words, decide whether 45 D. C. Code § 910 could validly compel the court to assist the plaintiff in penalizing the defendant for exercising her constitutional right to inform the government of violation of the law; for we are confident that Congress did not intend it to entail such a result.

45 D. C. Code § 910, in pertinent part, provides:

"Whenever * * * any tenancy shall be terminated by notice as aforesaid (45 D. C. Code § 902, see Not 1 supra), and the tenant shall fail or refuse to surrender possession of the leased premises, * * * the landlord may bring an action to recover possession before the District of Columbia Court of General Sessions, as provided in sections 11-701 to 11-749."

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*Footnotes have been edited and renumbered.

And 16 D.C. Code § 1501, in pertinent part, provides:

> "When a person detains possession of real property * * * after his right to possession has ceased, the District of Columbia Court of General Sessions * * * may issue a summons to the party complained of to appear and show cause why judgment should not be given against him for restitution of possession."

These provisions are simply procedural. They neither say nor imply anything about whether evidence of retaliation or other improper motive should be unavailable as a defense to a possessory action brought under them. It is true that in making his affirmative case for possession the landlord need only show that his tenant has been given the 30-day statutory notice, and he need not assign any reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities. As a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted.

The housing and sanitary codes,[1] especially in light of Congress' explicit direction for their enactment, indicate a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitory, places to live.[2] Effective implementation and enforcement of the codes obviously depend in part on private initiative in the reporting of violations. Though there is no official procedure for the filing of such complaints, the bureaucratic structure of the Department of Licenses and Inspections establishes such a procedure, and for fiscal year 1966 nearly a third of the cases handled by the Department arose from private complaints. To permit retaliatory evictions, then, would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington.

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[1] The District Commisioners have promulgated extensive housing regulations which require landlords to keep their premises in "clean, safe and sanitary condition." Housing Regulations of the District of Columbia, § § 2101, 2304 (1956). The purpose of the Regulations is set forth in § 2101:

"The Commissioners of the District of Columbia hereby find and declare that there exist residential buildings and areas within said District which are slums or are otherwise blighted, and that there are, in addition, other such buildings and areas within said District which are deteriorating and are in danger of becoming slums or otherwise blighted unless action is taken to prevent their further deterioration and decline.

The Commissioners further find and declare that such unfortunate conditions are due, among other circumstances, to certain conditions affecting such residential buildings and such areas, among them being the following: dilapidation, inadequate maintenance, overcrowding, inadequate toilet facilities, inadequate bathing or washing facilities, inadequate heating, insufficient protection against fire hazards, inadequate lighting and ventilation, and other insanitary or unsafe conditions.

The Commissioners further find and declare that the aforesaid conditions, where they exist, and other conditions which contribute to or cause the deterioration of residential buildings and areas, are deleterious to the health, safety, welfare, and morals of the community and its inhabitants."

As judges, "we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men." Ho Ah Kow v. Nunan, C.C. D. Cal., 12 Fed. Cas. 252, 255 (No. 6546) (1879). In trying to effect the will of Congress and as a court of equity we have the responsibility to consider the social context in which our decisions will have operational effect. In light of the appalling condition and shortage of housing in Washington,[3] the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions,[4] we do not hesitate to declare that retalitory eviction cannot be tolerated. There can be no doubt that the slum dweller, even though his home be marred by housing code violations, will pause long before he complains of them if he fears eviction as a consequence. Hence an eviction under the circumstances of this case would not only punish appellant for making a complaint which she had a constitutional right to make, a result which we would not impute to the will of Congress simply on the basis of an essentially procedural enactment, but also would stand as a warning to others that they dare not be so bold, a result which, from the authorization of the housing code, we think Congress affirmatively sought to avoid.

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[2] "The Commissioners of the District of Columbia, are authorized and directed to make and enforce such building regulations for the said District as they may deem advisable.

"Such rules and regulations made as above provided shall have the same force and effect within the District of Columbia as if enacted by Congress." 1 D.C. Code § 228 (1967). See also 1 D.C. Code § 226 (1967); 5 D.C. Code § 701 (1967).

Reorganization Order No. 55, Part III, C., 6., 1 D.C. Code, Appendix, at 137 (1967).

Of 47, 701 cases handled, almost 15,000 were initiated by private complaint. See Hearings Before the Subcommittee on Business and Commerce of the Senate Committee on the District of Columbia on S. 2331, S. 3549 and S. 3558, 89 Cong. 2d Sess., at 52 (1966). And the need for increased private and group participation in code enforcement has been widely recognized. Gribetz and Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum. L. Rev. 1254 (1966); Note, Enforcement of municipal Housing Codes, 78 Harv. L. Rev. 801, 834-860 (1965). See also Sax and Hiestand, Slumlordism as a Tort, 65 Mich. L. Rev. 869 (1967).

Hearings, supra Note 43, at 23, 90-114, 142-155, 192-196.

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[3] See Report of the National Capital Planning Commission, Problems of Housing People in Washington, D.C., reprinted in Hearings, supra Note 43, at 410:

"* * * Poor families are responding to Washington's housing shortage by doubling and overcrowding; by living in structurally substandard or other hazardous housing; by sharing or doing without hot water, heat, light, or kitchen or bathroom facilities; by farming out their children whereever they can; by denying their children exist to landlords and public officials; by paying rents which are high compared to incomes so they must sacrifice other living necessities; and by living without dignity or privacy. Each one of these features has been measured separately or has been observed in Washington's poverty areas."

See also Schoshinski, supra Note 41, at 519 ff.

See Kay v. Cain, 81 U.S. App. D.C. 24, 25, 154 F. 2d 305, 306 (1946).

[4] "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may deposit a community as an open sewer may ruin a river." Berman v. Parker, 348 V.S. 26, 32-33, 75 S. Ct. 98, 102, 99 L. Ed. 27 (1954). See also Frank v. State of Maryland, 359 U.S. 360, 371, 79 S. Ct. 804, 811, 3L. Ed. 2d 877 (1959): "The need to maintain basic, minimal standards of housing, to prevent

The notion that the effectiveness of remedial legislation will be inhibited if those reporting violations of it can le legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation even if it is not expressed in the statute itself. Such an inference was recently drawn by the supremacy clause a Florida statute denying unemployment insurance to workers discharged in retaliation for filing complaints of federally defined unfair labor practices. While we are not confronted with a possible conflict between federal policy and state law, we do have the task of reconciling and harmonizing two federal statutes so as to best effectuate the purposes of each.[5] The proper balance can only be struck

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the spread of disease and of that prevasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government."

According to the Report of the Planning Commission, supra Note 45, at pp. 5-6, "more than 100,00 children are growing up in Washington now under one or more housing conditions which create psychological, social, and medical impairments, and make satisfactory home life difficult or a pratical impossibility." Reprinted in Hearings, supra Note 43, at 410.

See e.g., John Hancock Mutual Life Ins. Co. v. N.L.R.B., 89 U.S. App. D.C. 261, 264, 191 F. 2d 483, 486 (1951): "Under petitioner's view, the Act (Labor Management Relations Act, now 29 U.S.C. § § 151 et seq. (1964 ed) would permit denial of employment to an applicant * * * on the ground that he had filed charges or given testimony before the Board. (This would)* * * thwart the administration of the Act itself by ignoring the ever present threat of such intimidation. Such a reading of the Act would be perversion of legislative intent.'

Nash v. Florida Industrial Commission, 389, U.S. 235, 88 S. Ct. 362, 19 L. Ed. 2d 438 (1967). See also Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231, 84 S. Ct. 784, 11 L. Ed. 2d 661 (1964), and its companion case, Compco Corp. v. Day-Brite Lighting, 376 U.S. 234, 237-228, 84 S. Ct. 779, 11 L. Ed. 2d 669 (1964).

[5] See, e.g., United States v. Borden Co., 308 U.D. 188, 198, 60 S. Ct. 182, 84 L. Ed. 181 (1939); Rawls v. United States, S. Cir., 331 F. 2d 21, 28 (1964). When Congress enacted 45 D.C. Code § § 902 and 910, it did not have in mind their possible use in effectuating retaliatory evictions. Indeed, when they were enacted there was no housing code at all. And in all probability Congress did not attend to the problem of retaliatory evictions when it directed the enactment of the housing code.

by interpreting 45 D.C. Code § § 902 and 910 as inapplicable where the court's aid is invoked to effect an eviction in retaliation for reporting housing code violations.[6]

This is not, of course, to say that even if the tenant can prove a retaliatory purpose she is entitled to remain in possession in perpetuity. If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all.[7] The question of permissible or impermissible purpose is one of fact for the court or jury, and while such a determination is not easy, it is not significantly different from problems with which the courts must deal in a host of other contexts, such as when they must decide whether the

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Our task is to determine what Congress would have done, in light of the purpose and language of the statute, had it confronted the question now before the court. And where there is a possible conflict, the more recent enactment, the housing code, should be given full effect while leaving an area of effective operation for the earlier statute. International Union of Electrical, Radio, etc., Workers v. N.L.R.B., 110 U.S. App. D.C. 91, 95, 289 F. 2d 757, 761 (1960). This task, we think, our resolution of the issue accomplishes.

[6] In a recent important decision the DCCA has held that as a matter of public policy a landlord who has rented housing space knowing that it contained housing code violations could not collect back rent from his ex-tenant. Brown v. Southall Realty Co., D.C. App., 237 A. 2d 834 (1968).

There have been several bills introduced in Congress which deal expressly with the problem of retalitory evictions. Hearings were held in the Senante, see Note 43, supra, on three bills but none was reported out of committee. H.R. 257, 90th Cong., 1st Sess. (1967), is now before the House Committee of the District of Columbia. Its companion bill, S. 1910, 90th Cong. 1st Sess. (1967), has been introduced in the Senate. The bill would forbid an eviction, except for specified reasons, during the nine months following the filing of a complaint. The proposed legislation is discussed in Note, Retaliatory Evictions and the Reporting of Housing Code Violations in the District of Columbia, 36 G.W.L. Rev. 190, 196-203 (1967). See also the suggestion for judicial implementation in Note. Landlord and Tenant--Retaliatory Evictions, supra Note 17, at 205-208.

[7] Of course, because of his prior taint the landlord may not be able to disprove an illicit motive unless he can show a legitimate affirmative reason for eviction.

employer who discharges a worker has committed an unfair labor practice because he has done so on account of the employee's union activities. As judge Greene said, "There is no reason why similar factual judgments cannot be made by courts and juries in the context of economic retaliation (against tenants by landlords) for providing information to the government.

Reversed and remanded.

McGowan, Circuit Judge (concurring except as to Parts I and II):

The considerations bearing upon statutory construction, so impressively marshalled by Judge Wright in Part III of his opinion, have made it unnecessary for me to pursue in any degree the constitutional sepculations contained in Parts I and II; and it is for this reason that I do not join in them. The issue of statutory construction presented in this case has never seemed to me to be a difficult one, nor to require for its resolution the spur of avoidance of consitutitonal questions. A Congress which authorizes housing code promulgation and enforcement clearly cannot be taken to have excluded retaliatory eviction of the kind here alleged as a defense under a routine statutory eviction mechanism also provided by Congress.

Danaher, Circuit Judge (dissenting):

Basically at issue between my colleagues and me is a question as to the extent to which the power of the court may here be exercised whereby (according to) their edict the landlord's right to his property is being denied. They concede as they must.

See, e.g, John Hancock Mutual Life Ins. Co. v. N.L.R.B., supra Note 48. And under 42 U.S.C. § 1971 (b) (1964 ed.), the court must decide whether economic pressures otherwise lawful are illegal because designed to intimidate the exercise of the right to vote in a federal election. See United States v. Beaty, supra Note 5; United States v. Bruce, supra Note 5. See also United States v. Board of Education of Greene County, Miss., 5 Cir., 332 F. 2d 40 (1964); L'Orange v. Medical Protective Co., supra Note 38; Petermann v. International Brotherhood of Teamsters, etc., Local 396, supra Note 38.

See generally, 45 D.C. Code § § 902, 910 (1967) and 16 D.C. Code § 1501 (1967).

> "that in making his affirmative case for possession the landlord need only show that his tenant has been given the 30-day statutory notice, and he need not assign any reason for evicting a tenant who does not occupy the premises under a lease."

That fundamental rule of our law of property must give way, it now develops. My colleagues so rule despite the absence of a statutory prescription of discernible standards as to what may constitute "violations," or of provision for compensating the landlord for the deprivation of his property. They say that the court will not "frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington." Since they recognize that there is an "appalling condition and shortage of housing in Washington,"[1] they say the court must take account of the "social and economic importance of assuring at least minimum standards in housing conditions." So to meet such needs, the burden would now be met, not pursuant to a congressionally prescribed policy, with adequate provision for construction or acquisition costs, or for compensation to property owners, but by private landlords who will be saddled with what should have been a public charge.

Berman v. Parker, 348, U.S. 26, 76 S. Ct. 98, 99 L. Ed. 27 (1954) held for the first time that the government here might condemn one's property and turn it over to another private "person" -- but not without due process, not without compensation.

[1] It is common knowledge that following Berman v. Parker, supra note 2, the housing structures in one entire quadrant of the City of Washington were razed, driving thousands of tenants to seek whatever "appalling" accommodations they could find. In place of the destroyed housing, beautiful apartment buildings have been built, to be sure, with "co-ops" in some costing up to $100,000 per apartment, with rentals in other priced far beyond the capacity to pay of thousands of those who had been displaced. And even the affluent tenants having chosen to do so, must be presumed, at least until now, to have taken the premises in the condition in which they found them, cockroaches and all.

The Washington Post on April 1, 1968 editorialized upon the need for a renewal project after "the wholesale bulldozing of slums and massive uprooting of families with them which characterized the Southwest development."

As Chief Judge Hood observed, writing for a unanimous District of Columbia Court of Appeals: "If, as some believe, the law relating to landlords and tenants is outdated, it should be brought up-to-date by and not by court edict."

Note how my colleagues acheive that result as they rule:

> "But while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities. As a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted."

Just as do my colleagues, I deplore the effort of any landlord for a base reason to secure possession of his own property, but if his right so to recover in accordance with our law is to be denied, Congress should provide the basis. Appropriate standards as a pre-condition thus could be spelled out in legislation and just compensation thereupon be awarded if found to be due.

I am not alone in my position, I dare say, as I read the Congressional Record for March 13, 1968, page H 1883. In President Johnson's message to the Congress he said:

> "One of the most abhorrent injustices committed by some landlords in the District is to evice -- or threaten to evict -- tenants who report building code violations to the Department of Licenses and Inspection.
>
> "This is intimidation, pure and simple. It is an affront to the dignity of the tenant. It often makes the man who lives in a cold and leaking tenement afraid to report those conditions.
>
> "Certainly the tenant deserves the protection of the law when he lodges a good faith complaint.
>
> "I recommend legislation to prevent retaliatory evictions by landlords in the District." (Emphasis added.)

Edwards v. Habib, 227 A. 2d 388, 392 (1967). In note 10, id., he quoted from Collins v. Hardyman, 341, U.S. 651, 663, 71 S. Ct. 937, 942, 95 L. Ed. 2d 1253 (1951), "It is not for this Court to compete with Congress or attempt to replace it as the Nation's lawmaking body."

Chief Judge Hood has traced out certain references to action already under way in Congress relating to the type of situation said to be present here. Edwards v. Habib, supra note 6, 227, A. 2d at 390-91. And see the majority opinion, n. 51.

He seems to think as do I that congressional action is required. It may be doubted that the President would so have recommended legislation except upon the advice of the legal authorities upon whom he relies. Certainly he is aware of the due process protective considerations which must be accorded to a landlord, even one who might be guilty of "an affront to the dignity" of a tenant. He must know that a community burden is not to be borne alone by landlords, charged with allegedly "retaliatory"[2] evictions because of complaints of "violations," undefined and vague and lacking in standards.

That my colleagues ultimately upon reflection began to doubt the sufficiency of their position seems clear enough, for they observe:

> "This is not, of course, to say that even if the tenant can prove a retaliatory purpose she is entitled to remain in possession in perpetuity." (Emphasis added.)

"Of course," not, I say; not at all as the law has read, until now, I may add. My colleagues continue:

> "If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evice his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all."

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[2] For background and as a matter of convenient reference, let it be noted that Edwards and Habib entered into a monthly tenancy agreement as of March 24, 1965. The tenant paid one month's rent in advance, and, of course, took the premises as she found them. The agreement provided that failure thereafter to pay the rental in advance would constitute a default and that the agreement was to operate as a notice to quit and that the statutory 30 days' notice to quit was expressly waived. Repeatedly thereafter the tenant was in default of payment of the rental. As of October 11, 1965, neither the appellant nor her counsel appeared in the Landlord-Tenant Branch of the Court of General Sessions. A later motion to reopen a default judgment was granted, a two-day trial followed, and a directed verdict for the landlord was entered.

This court was asked to stay the judgment after the District of Columbia Court of Appeals refused to do so. I then dissented from this court's order for reasons set forth in Edwards v. Habib, 125 U.S. App. D.C. 49, 51, 366 F. 2d 628, 630 (1965), to which I now refer. In the meanwhile, time and again, further defaults occurred with resulting harrassment and vexation to the landlord which this court has often overlooked. The landlord

And so, it may be seen according to the majority, we need never mind the Congress, the aid of which the President would invoke. We may disregard, even reject, our law of such long standing. We will simply leave it to a jury to say when a landlord may regain possession of his own property, although "the determination is not easy," my colleagues concede.[3]

I leave my colleagues where they have placed themselves.

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is still without possession of his property which should have been available to him for remodeling or sale, or even that the structure might be razed. Unless its condition could justify its condemnation by lawful authority, his should have been the option as to future use of the property.

It is difficult for me to understand how this court can sustain so studied a deprivation as has here occurred.

[3] And with the results in riot-torn Washington so painfully obvious the prospect now being opened up may seem horrendous indeed, whether the "violations" were committed by the tenants themselves or by others whose conduct created conditions with which the landlord must cope. I cannot accept the premise that Congress even remotely entertained any such "intent" as my colleagues so confidently proclaim.

Comments on Retaliatory Eviction.

1. The defense of the landlords motive is just now being raised in the courts for the first time. In general, unless the landlord is bound by some specific statute (as Habib was for example in giving Mrs. Edwards 30 days' notice) or by some clause in the lease, he is now considered able to evict his tenant for any reason or for no reason.

2. Three other cases suggest various uses and reactions to the retaliatory eviction defense and the question of non-compliance with the housing code as a condition changing the rights and responsibilities of the landlord and tenant.

a. In a recent Florida case with facts very similar to Edwards v. Habib, the court ruled for the landlord holding that any showing that his property was in violation of the fire safety laws, that the tenants reporting this violation was the basis for eviction, was simply outside the questions to be decided by the court in an eviction proceeding. They put aside the Edwards decision (which, of course, was not binding on a state court anyway) by indicating that for some reason those same facts were rightly considered in Edwards. See Wildens v. Tebbetts, 216 S 02 477 (1968).

b. A slightly different variation is seen in another District of Columbia case. In Saunders v. First National Realty Corporation, 245 A2 836 (1968), the District of Columbia Court of Appeals held that the landlord's violation of housing regulations is not a defense to his action for possession based on non-payment of rent. It is interesting to note here that in the Edwards case the court agreed to allow Mrs. Edwards to remain in the house until the case had been tried on the condition that she continue to pay rent. This is, perhaps, an echo of the long history of a separation in the court's treatment of the covenant to pay rent from any other covenants made by either of the parties.

c. Portnoy v. Hill, which follows, uses Edwards v. Habib to reach its conclusion, but also includes an interesting settlement of the rent problem.

Lillian Portnoy, Petitioner, v. Sandra Hill, Respondent.

Landlord brought summary proceedings for eviction. The City Court, Walker T. Gorman, J., held that where tenants had participated in rent strike and at time landlord filed petition for summary eviction tenants had not paid rent for some period of time, rent had to be paid in full, except for period of time that premises were not found to be in compliance with housing code or for period that social services department might have rent withheld and upon such payment a trial would be had wherein tenant would have opportunity of presenting defense of retaliation for reporting violations of housing code to landlord's summary eviction proceedings.

So ordered.

Decision

Walter T. Gorman, Judge.

This action for summary proceedings was commenced by the Petitioner, Lillian Portnoy, the owner and landlord of 72 Susquehanna Street, Binghamton, New York. The Respondent in the action is Sandra Hill, an occupant of the Susquehanna Street premises, and referred to as the Tenant. Similar proceedings have been instituted against two other tenants, Bonnie Monta and Lily Bradley, but by means of a stipulation have been consolidated with the action now before this Court.

The landlord bases her action on the fact that she gave the tenant the required statutory thirty day notice, (Sec. 232-b Real Property Law) and consequently is entitled to an order of eviction. The tenant, on the other hand, takes the position that this is merely a retaliatory tactic on the part of the landlord to obtain her eviction for reporting alleged violations of the Housing, Property Maintenance and Rehabilitation Code of the City of Binghamton, commonly called the Housing Code. The tenant further alleges in her answer to the petition that such retaliation is a complete defense to the landlord's action and that she should have an opportunity to prove it at a trial. This, as far as the Court can ascertain, is a case of first impression in the State of New York and thus presents a unique question. To fully comprehend the matter, it would seem best to briefly review the proceedings had heretofore involving the very same parties.

On June 21, 1968 the landlord filed a petition for summary proceedings in City Court. The basis of this petition was that the tenant had failed to pay the rent and the landlord was therefore asking for her eviction. On the return date, the tenant, through her attorney, admitted that the rent had not been paid and that she and the other two tenants were participating in a so-called "rent strike." At that time she sought through her attorney, to interpose an affirmative defense, i.e. "illegality of the lease." The crux of this alleged defense, and what the tenant's attorney wanted to prove at a trial was that the premises, at the time the action was commenced, as opposed to when the landlord-tenant relationship was created, were not in compliance with the Housing Code. It was his contention that both the landlord and the tenant, as parties to an illegal lease, should be left where they were found. The Court was of the opinion that this would settle nothing. The tenant would be living there free and the premises would never be brought into compliance, if indeed they were not in compliance. It was further felt that the tenant had not exhausted her remedies under the Housing Code, wherein a procedure was set up for an enforcement officer to inspect the dwelling in question, and where violations were found and not corrected, substantial penalties could be imposed against the landlord until, or unless, the properties in question were brought into compliance. For these reasons, the opportunity to offer this proof at a trial was denied and the warrant of eviction was issued.

A stay of this warrant was obtained from the Broome County Court and an appeal was taken. Subsequently, on August 29, 1968 the Broome County Court affirmed the lower Court's ruling, and this ruling is now on appeal to the Appellate Division. With this background in mind we proceed.

No reported case in the State of New York could be found where the defense of retaliation was ever interposed or, in fact, offered. However, the United States Court of Appeals for the District of Columbia Circuit, in the case of Edwards v. Habib, 397 F. 2d 687 did allow such a defense.

In that case, involving a similar set of facts as we have here, the Court decided that the pertinent District of Columbia statutes (45 D. C. Code Sec. 902 and 16 D. C. Code Sec. 1501) were merely procedural and in no way prohibited the defense of retaliation from being used.

Judge J. Skelly Wright went on to state (pp. 699-701) that "while the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities. As a matter of statutory construction and for reasons of public policy, such an eviction cannot be permitted."

"The housing and sanitary codes, especially in light of Congress explicit direction for this enactment, indicate a strong and pervasive Congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live. Effective implementation and enforcement of the codes obviously depend in part on private initiative in reporting of violations * * * To permit retaliatory evictions, then, would clearly frustrate the effectiveness of the housing code as a means of upgrading the quality of housing in Washington."

It is quite clear that this Court did not base its opinion on any specific statute as none was in existence. The opinion was based in part on public policy and on the Court's interpretation of Congress' legislative intent in enacting the housing code to upgrade housing in the District of Columbia, and its further reasoning that Congress did not intend to exclude the defense of retaliation merely because they did not create a statute to cover it.

1. Unlike the District of Columbia statutes, Section 743 of the New York Real Property Actions and Proceedings law states that the answer in a Summary Proceeding may contain any legal or equitable defense or counterclaim. While the defense of retaliation has no basis in law it could be interposed as an equitable defense.

2. Binghamton City Court has no equitable jurisdiction. However, in Makas v. Makas, Co. Ct., 53 N. Y. S. 2d 375, 376, it was stated: "While it is true that a Justice Court or a City Court has no equitable powers, an equitable defense may be set up in any court as a shield to an action at law, and this does not give to the courts equitable authority." It is the Court's opinion, therefore, that the case for allowing the defense of retaliation in New York is much stronger. Not only may we rely on public policy and the need for improving and upgrading housing but it also seems quite clear that there is statutory authority for allowing it.

However, the defendants openly admit participating in a "rent strike." When the petition for summary proceeding was commenced they had not paid rent for some period of time. In other words, while the proceedings have been taking place the tenants have been paying no rent at all and in effect what they are saying is—"We want the law enforced against the landlord, but not against us."

3. He who seeks equity must do equity, and he who comes into equity must come in with clean hands.

4. The premises having now been inspected, it is hereby ordered that when the rent is paid in full, save for that period of time that they were not found to be in compliance or for that period that the Social Services Department might have withheld it under Section 143-b Subdivision 2 of the Social Welfare Law, a trial will be held wherein the tenant will have the opportunity of presenting the defense of retaliation.

Comment:

1. Retaliatory eviction is not always accepted as a defense. In La Chance v. Hoyt, decided in the Connecticut Circuit Court No. CV 14-685-35851, September 6, 1968, the court rejected retaliatory eviction as a defense.

   Monchun, J. for the court ...
   The Court finds that the defense of "retaliatory action" has no place whatsoever in the subject summary process action. It is not a valid defense. There is no evidence that the legislature at any time ever considered such a defense or had such an intent when enacting legislation concerning summary process actions.

   During the emergency days of the Second World War, the federal government made rent controls which spelled out the rights of the landlord and tenant. In 1947 the General Assembly adopted rent control legislation to be operative upon the expiration of federal rent controls. A series of amendments were enacted by the legislature until all controls were terminated as of March 31, 1956. The decision of the legislature in the 1955 session was that as a matter of public policy rent controls were no longer necessary in the interest of public health, safety and welfare. Amendments were made to the summary process statutes at each session subsequent to 1955; jurisdiction over summary process actions was given to the Circuit Court upon the establishment of the Circuit Court. At all times the statute on summary process has been strictly construed and the legislature has been specific in its wording. The legislature has set forth specifically the grounds for eviction, the time element, and how to get a stay of execution on the judgment. The legislature has guarded jealously its prerogative to determine and set forth the rights of landlords and tenants. The legislature determines public policy. It is inconceivable to expect that a Judge would usurp the functions of the legislature; any change in the rights of landlord and tenants should be undertaken by the legislature; not the courts. The lawmakers deliberate as a group and enact legislation accordingly. The statute on summary process actions has to be followed closely; the special defense of "retaliatory action" has no place or standing under the statute. Paiwich v. Krieswalis, 97 Conn. 123; Lorch et al., v. Page, 97 Conn. 66; Burton et al. v. City of Hartford et al., 144 Conn. 80; Old Colony Gardens, Inc. et al. v. City of Stamford et al., 147 Conn. 60, Connecticut Betterment Corporation v. Ponton et al., Circuit Court May 9, 1968; West Haven Housing Authority v. Simmons Jr., et al., Circuit Court March 7, 1968; and West Haven Housing Authority v. Simmons, Jr. et al., Circuit Court April 18, 1968.

This opinion is not to be construed as a condemnation of the efforts made on behalf of tenants victimized by unscrupulous landlords but the tactics used and objectives sought by counsel for the tenant in this case are questionable. The tenant wrote to state authorities concerning his housing problem and was advised that the state had no authority over local housing codes and housing enforcements and that this matter was being referred to the City; subsequently the state did enter into the matter claiming that the State of Connecticut is a party to the matter for various reasons. The tenant wrote to the local authorities of the City of Hartford who made an inspection promptly, issued certain orders, were satisfied with the progress of the repairs and the plans for the completion of the repairs, and never sought to use criminal penalties to enforce their orders. There is no question but that cities have the authority to enact a housing code and to establish penalties for noncompliance. State v. Schaffel, 4 Conn. Cir. Ct. 234. Hartford does have such a code and enforcement provisions. Counsel for the tenant, in argument, admitted that this arrangement for enforcement was not pursued because of the general feeling that local authorities are not diligent enough in matters of this type.

The tactics employed by counsel for the tenant in the state court are open to question. The plaintiff landlord instituted this summary process actions were used only as fashion. The tenant's counsel entered his appearance and deliberately allowed a default judgment to be entered against the tenant. An application for a Stay of Execution was then filed in accordance with provisions of our General Statutes, alleging that the tenant has used due diligence to secure other premises, that the application is made in good faith, and that the terms and provisions of the court will be complied with. Obviously this is not true. The application was filed subsequent to the time that the tenant had instituted federal court proceedings. The Circuit Court was used merely to show state action to justify federal court action. The statutes regarding summary process actions were used only as needed in part to further the claims made in the federal court, not as intended by the legislature.

The objective sought by counsel for the tenant is also open to question. The end result sought by counsel for the tenant is a finding that the landlord brought eviction proceedings against the tenant in retaliation for the tenant's complaints regarding housing code violations, and thus enable the tenant to seek money damages, actual and punitive, provided for in the Civil Rights Act. To subject a landlord to such a threat would create chaos in the landlord-tenant relationship. Oral leases would disappear, written leases would control every aspect of the tenancy. The small property owner who owns, manages, and keeps in repair by his own efforts his property would disappear and the source of lower cost housing would disappear. The incentive to own rental units would vanish with the realization of the dangers that a landlord could face. The legislature has never indicated such a policy to go into effect.

In view of the finding that there cannot be a defense of "retaliatory action," then it is immaterial as to whether or not the landlord in this action sought to evict the tenant as retaliation for complaints to various local and state agencies.

Judgment may enter for the plaintiff to recover possession of his premises.

2. The following material is an actual complaint involving the question of retaliatory eviction. Based on the cases you have read, write an opinion on the facts presented.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

SHIRLEY SMITH

Plaintiff,

Civil Action No. ___

vs.

COMPLAINT

JOHN JENKINS AND HIS WIFE,
FLORENCE AND ALL PERSONS ACTING
IN CONCERT OR COOPERATION WITH THEM,

Defendants.

Now comes the above-named plaintiff by James Esquire, her attorney, and for a cause of action against the above-named defendants, shows to the court and alleges that:

1. The jurisdiction of this court over the instant suit is based upon Title 28, U. S. C. Section 1343(3), 1343(4), 2201, 2202, and 2283.

2. The instant suit is commenced pursuant to Title 42, U. S. C. Section 1983.

3. The rights and privileges sought to be redressed herein are those secured by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. The plaintiff, SHIRLEY SMITH, is an adult citizen of the United States and a resident of the State of Wisconsin.

5. Plaintiff, SHIRLEY SMITH, lives with her six children, Dave, age 13, Barbara, age 11, Brian, age 8, Lenny, Jr., age 6, Joey, age 5, and Leanes, age 2, in a four room dwelling unit on the first floor of the premises located at 2031 South Fifth Place, City and County of Milwaukee, State of Wisconsin. Plaintiff is divorced and receives a monthly sum of $301.00 under Aid to Families with Dependent Children.

6. On information and belief, defendants, JOHN JENKINS and his wife, FLORENCE, are the owners of the premises known as 2031 South Fifth Place, City and County of Milwaukee, Wisconsin.

7. On or about November 28, 1967 plaintiff rented the above-described dwelling unit from defendants at a rental of seventy-five ($75.00) dollars per month under a month-to-month oral lease, including electricity.

8. On or about December 31, 1968 plaintiff telephoned defendant FLORENCE JENKINS to report excessive water leakage around the kitchen sink pipes in her apartment.

9. On or about January 19, 1969 the plaintiff telephoned the Milwaukee Department of Building Inspection and Sanitary Engineer-

ing to complain about further excessive water leakage, infestation of rats in the basement, and defective rain gutters.

10. In response to plaintiff's complaint, on or about January 13, 1969 Inspector Charles Schwam of the Milwaukee Department of Building Inspection and Safety Engineering inspected the above-described premises for violations of the Milwaukee Housing Ordinance.

11. On information and belief Inspector Schwam caused to be served upon defendants a notice or order indicating that the premises violate provisions of the Milwaukee Housing Ordinance and that defendants would be subject to penalties therefor upon failure to comply with the notice or order.

12. On January 31, 1969 plaintiff received from defendant FLORENCE JENKINS by hand delivery two letters. (Copies of both letters are attached hereto.) One letter constituted a notice terminating tenancy on thirty days notice as of March 1, 1969, and indicated that notice was served because plaintiff had informed the Department of Building Inspection and Safety Engineering of ordinance violations. The other letter informed plaintiff that her rent would be increased to $125.00 a month if she failed to move from the premises by March 1, 1969.

13. Upon information and belief at all times herein mentioned, the defendants were acting according to and under the color of authority of state law, viz., Chapters 234 and 291, Wisconsin Statutes, which prescribe the manner and procedure for terminating a periodic tenancy upon thirty days notice.

14. Upon information and belief plaintiff and her children are threatened with eviction solely because she exercised her constitutional rights to petition for a redress of grievances and to report violations of the law as guaranteed under the First and Fourteenth Amendments to the United States Constitution.

15. Upon information and belief plaintiff and her children are threatened with eviction and legal action contrary to the public policy of the laws of the State of Wisconsin and Housing Ordinance of the City of Milwaukee.

16. Upon information and belief these violations and infringements upon the exercise of constitutional rights warrant an injunction under 28 U. S. C. Sec. 2283 against any unlawful detainer proceedings brought by defendants in a Wisconsin court against plaintiff. If plaintiff is evicted by state court proceedings prior to trial of this action, a final decree by this court in favor of plaintiff would be futile.

17. Plaintiff has no adequate remedy at law because, upon information and belief, she is not entitled to raise these issues as defenses to a summary unlawful detainer action against her under present Wisconsin law.

18. Plaintiff is threatened with irreparable harm because she cannot find suitable, safe, and healthy relocation housing for herself and her six children. She receives welfare assistance under Aid to Families with Dependent Children and is allowed only $65.00 per month for rent in her welfare budget. Plaintiff is divorced.

She has already inspected at least twelve units for rent which have either been too small for her family of six, too expensive, or not available to her because she is divorced, she is on welfare, or she has six children. Because of her family's size she must have at least a three bedroom unit for suitable, safe, decent and healthy housing.

WHEREFORE, the plaintiff SHIRLEY SMITH respectfully prays that this Court:

1. Pending a hearing on the merits of this controversy, enter a temporary restraining order and a preliminary injunction pursuant to Title 28, U. S. C. Sec. 2283 restraining defendants, their agents, attorneys, and all others acting in concert with them from evicting plaintiff and her children for any cause other than the payment of the agreed rent of $75.00 per month, or from increasing her rent to $125.00, or from in any way impeding, interfering with, or retaliating against plaintiff for a redress of grievances or to report violations of law.

2. Enter a declaratory judgment pursuant to Title 28, U. S. C. Secs. 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the practice of evicting plantiff solely in retaliation against her for her complaints to the Milwaukee Department of Building Inspection and Safety Engineering violates plaintiff's constitutional right to petition for redress of grievances, her constitutional right to report violations of law, and the public policy of the State of Wisconsin.

3. Enter a permanent injunction restraining the defendants, their agents, attorneys, and all others acting in concert with them from evicting plaintiff and her children for any cause other than payment of the agreed rent of $75.00 per month, or from increasing her rent to $125.00, or from in any way impeding, interfering with, or retaliating against plaintiff for her exercise of her constitutional rights to petition for a redress of grievances or to report violations of law.

Respectfully submitted,

____
Attorney for Plaintiff

P. O. Address:
Milwaukee Plan - Legal Services
Southside Branch
1322 South 16th Street
Milwaukee, Wisconsin 53204

State of Wisconsin)
) SS.
Milwaukee County)

SHIRLEY SMITH being first duly sworn, on oath deposes and says that she is the affiant above-named; that she has read the foregoing affidavit and knows the contents thereof and that the same is true of her own knowledge except as to matters therein alleged upon information and belief, and as to those matters, she believes the same to be true.

Shirley Smith, affiant

Subscribed and sworn to before me
this 25th day of February, 1969.

Notary public, Milwaukee County
State of Wisconsin
My commission is permanent.

3. Several bills have been introduced to make retaliatory evictions illegal in various states. The following New Jersey statute is an example.

New Jersey Statutes 2a: 170-92.1 (Supp. 1967)

"Reprisal against tenant; rebuttable presumption. Any person, firm or corporation or any agent, officer or employee thereof who threatens to or takes reprisals against any tenant for reporting or complaining of the existence or belief of the existence of any health or building code violation, or a violation of any other municipal ordinance or state law or regulation which has as its objective the regulation of rental premises, to a public agency, is a disorderly person and shall be punished by a fine of not more than $250.00, or by imprisonment for not more than 6 months or both.

"In any action brought under this section the receipt of a notice to quit the rented premises or any substantial alteration of the terms of tenancy without cause within 90 days after making a report or complaint or within 90 days after any proceedings resulting from such report or complaint shall create a rebuttable presumption that such notice or alteration is a reprisal against the tenant for making such report or complaint." (L. 1967, c 215, Dec. 1, Approved Oct. 5, 1967.)

VI. PUBLIC HOUSING

A. Introduction:

One important area which must be considered in any discussion of the urban housing situation is public housing. Public housing is that housing supported by the government, federal, state or municipal, and specifically for low-income families. Most public housing units in urban areas are as grim as the neighborhoods in which they are placed. The housing itself and the way in which it is administered tend to add more to the problems of the low-income citizens than they tend to alleviate those factors. The specific areas with which the legal process has and should deal are tenant rights, eligibility requirements and site selection and construction.

As you read the cases and articles keep in mind the questions raised by the definition of the role and rights of the housing authority. Should the Housing Authority have the same perrogatives as a private landlord, or should their role be closer to any other administrative agency. Also note the particular problems of the tenants, dependant, in an overburdened market, on a massive bureaucracy for their shelter.

Finally, one must consider the handicaps under which urban housing authorities operate. They have grossly inadequate supply of housing for the group of people whom they are to serve. They have a limited amount of funds for repair and upkeep. They are, because of the tension in the country now constantly caught between the needs of their tenants and a generally hostile political process on which they must depend for all funds.

B. "PUBLIC LANDLORDS AND TENANTS: A SURVEY OF THE DEVELOPING LAW."*

Robert S. Schoshinski*

The Housing Act of 1937, as amended,[1] sets forth a federal policy "to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income ...(by vesting) in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program ..."Low-rent housing" is defined as "safe, and sanitary dwellings within the financial reach of families of low income ..." This survey examines the management policies of public housing projects presently in operation under Act,[2] determines the extent to which these projects are accomplishing the state purposes of the federal housing program and related anti-poverty programs, and explores the remedies available to the Government and the public housing tenant to force compliance with these purposes.

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[1] 42 U. S. C. S 1401-30 (1964), as amended. 42 U. S. C. A. SS 1401-22 (Supp. 1968).

[2] The locally owned and federally supported public housing program authorized by the 1937 Act has been implemented in every state, and the great majority of public housing units are encompassed by it. See Friedman, Public Housing and the Poor; An Overview, 54 Calif. L. Rev. 642, 642,-43 n.7 (1966). Note, Remedies for Tenants in Substandard Public Housing. 68 Colum. L. Rev. 561 n.3 (1968). Under this program Local Authorities build, own and operate low-rent public housing as public corporations under state enabling legislation. Loans and annual "Contributions" (subsidies) are provided by the federal government to aid

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It is not the purpose of this study to delve into the myriad of factors which have caused the acute shortage of decent low-rent public housing in this country.[3] Instead, this undertaking is limited to an evaluation of existing projects--the problems in project management, such as the extreme dilapidation of older sites, peculiar to particular types of projects, as well as the generally more prevalent problems of mismanagement, funding, repair social services, and tenant eligibility.

1. SUB-STANDARD PUBLIC HOUSING

The declared purpose of the Housing Act was to provide low income families with "decent, safe and sanitary dwellings," however, projects constructed in the early stages of public housing as well as more recent structures have fallen into varying states of disrepair ranging from grossly dilapidated projects which can be classified "public housing slums[4]to projects which, although not in advances stages of deterioration, are not properly maintained.

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in paying the interest and amoritization of bonds sold by the Local Authorities to finance construction. See 42 U. S. C. SS 1401-10 (1964); Freidman, supra, at 648; 68 Colum. L. Rev., supra at 561.

[3] The 1960 census indicated that 10.6 million of the available 58.3 million housing units in the U. S. were substandard. See Davis, Cooperative Self-Help Housing, 32 Law & Contemp. Prob. 409 (1967)

[4] See H. Salisbury, The Shook-Up Generation 74 (1958); Friedman, supra note 4, at 644 Mulvihill, Problems in the Management of Public Housing, 35 Temp. L. Q. 163, 179 (1962); 68 Colum. L. Rev. supra note 4.

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Tenants cite incompetent and unsympathetic management as the cause of public housing deterioration while public housing authorities point to increasing costs of labor and material[5] decreased revenues from project operation, and excessive misuse of the units as reasons for their failure to repair.[6] Yet, Housing Assistance Adminstration (HAA) officials and local management, at least until recently, have placed a major emphasis upon producing high residual receipts to reduce federal contributions and have not plowed income back into maintenance programs. All these elements contribute to the problem, but principal blame can be placed on two facts: first, a manifest lack of clearly defined guidelines and, second, inadequate provisions for financing the badly needed repairs and maintenance.

The Statutory Framework

The Housing Act is silent as to any specific program or procedure for maintenance and rehabilitation of public housing, stating merely that the purpose of the legislation is to provide housing (for the poor) in a decent, safe and sanitary condition, and that the annual contributions from the HAA to the Local Authority are "to assist in achieving and maintaining the low-rent character of their housing projects." State enabling legislation also mentions the goal of providing low-rent, safe and decent housing for persons of low income and most enabling acts specifically apply local housing codes to the project.

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[5] A related problem is featherbedding--unions demand that electricians replace light bulbs and that carpenters replace screws in brackets. Ledbetter, Public Housing -- A Social Experiment Seeks Acceptance. 32 Law & Contemp. Prob. 490, 509 (1967). Rigged bidding and bribery are also costly. Id.; N. Y. Times, Oct. 19, 1966, at 1, col. 8.

[6] In New York City, vandalism may cost as much as $40,00.00 per project annually. Mulvilhill, supra note 6, at 179. Much-needes funds for renovation are expended to improve lighting, install unbreakable

The Annual Contributions Contract (ACC) between the federal government and the Local Authority emphasizes the construction and maintenance of decent housing quarters. Section 213 of the Contract requires the Local Authority, to maintain in the property in good repair and to restore housing units destroyed by certain casualties. Moreover, if the Local Authority has not met its maintenance obligations, the federal government may then seek several remedies through the HAA, the administrator of the federal program.

The HAA has the right to reduce or terminate annual contributions payable under the ACC upon breach of the condition that requires preservation of "each Project in good repair, order and condition" ... In addition, HAA is empowered to "maintain any and all actions at law or in equity against the Local Authority to enforce the correction of (or enjoin) any ... default or breach." It would seem that in cases of nonfeasance in maintenance the federal government could seek an injunction ordering necessary repairs. Such action would also seem appropriate in cases of inordinate delay in making repairs. One other remedy potentially available to the government is a write of mandamus. For mandamus to lie the Government must allege the existence of a duty sought to be enforced, a right legally demandable from the person to whom the order must be directed, the respondent's power to perform the duty required, the petitioner's clear right to the relief sought, and the respondent's refusal or failure to perform the acts sought to be enforced. The ACC has clearly set out the Local Housing Authority's duty to maintain and repair the premises; it appears that a breach of this duty would be a failure to perform a ministerial non-discretionary act, and, therefore, subject to Government enforcement by mandamus.

Federal Directives and Regulations

Under the Housing Act responsibility for the operation of projects remains in the Local Housing Authority. The federal government, however, does assist the Authority through supervisory directives such as those published in Management Handbooks. Some directives are mandatory, others are merely suggestive. Unfortunately, rather than developing coherent programs or guidelines to cope with deterioration and obsolescence, the chief concerns of the directives, until recently, have been technical procedures and mechanics of repair and maintenance.

Federal officials apparently feel that tenant complaints concerning the absence of, or delay in, repair are better left to the Local Authority's discretion with the Public Housing Authority (PHA) applying only persuasion and gentle pressure. PHA's major weapon is its program of periodic inspections of all projects with a report and recommendation to the Authority on what action is necessary to bring the projects up to habitable standards, but failure to act is met only by continued urgings of compliance. Nevertheless, this system of inspections would seem to adequately assure the proper upkeep and modernization of projects if coupled with responsible management and adequate funding...

Private Remedies

The Government's responses to substandard public housing are limited; however, there remains the possibility of the tenant bringing a suit on his own behalf against the Local Authority. One inherent obstacle to this is the lack of formal administrative procedures available to public housing tenants. While informal complaints may well be heard by state agencies, there is no direct right to judicial review under local law, although it has been suggested that tenants seek review of HAA inaction on their complaints under the Administrative Procedure Act which makes reviewable a "failure to act."

Two possible problems exist in the effective utilization of the latter approach: (1) What constitutes "an abuse of discretion," and (2) do tenants suffer a "legal wrong," and thus gain standing when the HAA ignores their complaints. Federal courts have accorded standing to those classes who allege harm to an interest Congress intended the agency to protect. Substandard housing is the type of injury the congressional statute was designed to prevent. The aim of the legislation was clearly to protect the tenant, and it appears that some authorities have breached their duty to provide decent, safe and sanitary housing...

Under common law the landlord had no duty to maintain a dwelling in habitable condition in the absence of an express covenant. Public housing leases are invariably standard form and do not include a covenant to repair. However, the contractual duty to repair set out in the ACC or the statutory duty to repair set out by state and local housing codes may be treated as incorporating into the lease an implied duty to repair.

The United States Court of Appeals for the District of Columbia Circuit in a 1960 decision, Whetzel v. Jess Fisher Management Co., held that the housing regulations create a duty on the part of the landlord to maintain the premises in a safe condition and that the landlord is liable to the tenant for injury sustained as a result of a violation. The court, citing section 2304 of the D. C. regulations, stated, "(a)t the very least, this imposes an obligation upon the landlord to put the premises in safe condition prior to their rental." If housing codes may impose a duty upon the landlord the breach of which will lead to recovery in tort, it seems logical to contend that those codes also impose a contractual obligation --an implied covenant that the premises are fit for decent, safe and sanitary habitation, and meet minimum standards established in the local codes, the ACC, and the HAA regulations.[7]

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[7] The landmark Wisconsin case of Pines v Perssion, 14 Wis. 2d 590, 11 N. W. 2d 409 (1961), implied a warranty of habitability based on the public policy implicit in legislation and regulations concerned with housing standards.

One other possible ground in tort for implying a duty to repair may arise because the standard form lease between the Authority and the tenant generally includes a covenant allowing the Authority to enter the dwelling for purposes of repair, a few courts have held that a private landlord who merely reserves the right to enter and repair, without expressing any obligation to do so, is liable in tort to persons injured on the property by repairable defects. This doctrine of implied liability through a covenant to enter and repair seems even more applicable to the public housing situation where the tenant, with a standard of living only slightly above the subsistence level, must rely on the Authority's resources to repair and maintain his premises.

Even if the tenant successfully argues that the Authority breached an implied duty to maintain and repair, he would be faced with the traditional doctrine of landlord-tenant law holding that the covenant to pay rent in a lease is independent of the covenant to repair and he could not withhold his rent. His measure of recovery in damages would be determined by what one commentator has aptly described as "the amount he could get for well-maintained premises from a mythical sublessee, ... (a) standard bear(ing) ... . little relation to the wrong of which the tenant in fact complains ..."

11. TENANT ELIGIBILITY

The rights of the indigent are undefined and largely ignored in Local Aurhority determinations of tenant eligibility. Many Local Authorities have established grounds for eviction and denial of admission which are without statutory bases, are inconsistent with the overall objectives of our public housing and anti-poverty programs and are often unconstitutional. The only federal legislative criterion is that tenants be low-income families. Without legislative mandate, however, Authorities have declared tenants ineligible for public housing on the basis of vague desirability standards, on the equally vague basis of violations of lease provision, for giving birth to and housing illegitimate children, is retaliation for constitutionally protected activities, or for no expressed reason at all. Moreover, there is a decided lack of procedural safeguards to control Authorities in making their determination of substantive grounds for denial of the benifits of public housing.

Nothing in the legislative history of the Housing Act and its subsequent amendments indicates that Congress intended the setting of any standards of eligibility other than low income. Prior to 1959, the responsibility for setting eligibility standards rested solely with the federal government. Following the spirit of the Housing Act, the Public Housing Authority Act standards dealt exclusively with income, the sole federal legislative criterion, and granted priorities only on the basis of military service and certain disabilities. In 1959 amendments to the statute vested in the Local Housing Authority the primary responsibility for determining eligibility and discretion in making that determination. These amendments did not add any substantive eligibility requirements to existing federal policy but merely decentralized and transferred the power to set income limitations and establish priorities among eligible families to the Local Authorities.

State enabling statutes are likewise silent as to continued occupancy standards, except for the income limitation. They are concerned primarily with the maintenance of the low rent character of projects in tenant selectivity, continued occupancy, and rent determinations. They do empower the Local Authority to establish rules and regulations to "effect the powers and purposes of the authority," but with the circumscription that such regulations not be "inconsistent with this Act."

The ACC echoes this legislative sentiment. Although it does not mention eviction per se, the ACC emphasizes the maintenance of the low rent character of each project, moreover, scrutiny of the contract reveals that the exclusive concern of the federal government in the area of continued occupancy is that tenants continue to meet the income requirements.

Nonetheless, some HAA directives seem, by implication, to authorize Local Aurhorities to establish additional substantive requirements for eligibility. The Low-Rent Management Manual and the ACC allow the Local Authority to promulgate its own admission and eviction policies and place no express prohibition on the consideration of facts other than income. The only requirement is that admission regulations must be "reasonable." However, the Local Housing Authority Management Handbook goes much further by expressly allowing the admission policies of Local Authorities to take into account factors not contained in the Act "provided they would not be contrary to the purposes of the low-rent program." In recent years many Authorities have relied upon this directive to validate their establishment of restrictive admission requirements...

Residency Requirements

Many housing authorities impose a residency requirement in determining eligibility for public housing. Such a test not only may arbitrarily deny decent housing but also, in a very real sense, may affect the constitutionally protected freedoms of association and movement.[8] As in the case of the undesirability standards, there is nothing in the federal housing statutes or their legislative history to sanction a residency requirements; the only federal legislative criterion for eligibility is the income requirement. Although the Housing Act and the ACC allow great latitude and discreation in setting admissions policies, each omits any reference to residency in setting forth possible factors to be considered in eligibility and preference. Most state enabling statutes do not mention residency requirements, although a few, such as those of Minnesota and Massachusetts, do speak of giving preference or priority to inhabitants of the municipality in which the project is located if the number of applicants should exceed the number of units available.

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[8] The tragic effect of residency requirements on indigents was recently recognized in the Kerner Commission Report. The Commission's findings, while directed to the welfare residence requirement apply equally to the effects of the residency requirement on public housing applicants:

(1) In most states, there is a residence requirement, generally averaging around a year before a person is eligible to receive welfare. These state regulations were enacted to discourage persons from moving from one state to another to take advantage of

Although no legislative mandate to impose such a residency requirement, the HAA has lent some support to the validity of the requirement through its advisory directive, the Local Housing Authority Management Handbook. In authorizing Local Authorities to consider factors other than those listed in the Act in establishing admission policies, the Handbook cites as one example residency in the locality for a minimum period.

HAA authorities have indicated that a residency requirement was authorized because HAA has traditionally viewed the initiation planning, and development of public housing of low income families as a local rather than a federal function. It has therefore felt that it was reasonable to allow municipalities to limit low-cost housing to its residents.

Seizing upon this HAA authorization, Local Authorities have imposed residency requirements.

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higher welfare payments. In fact, they appear to have had little, if any, impact on migration and have frequently served to prevent those in greatest need -- desparately poor families arriving in a strange city -- from receiving the boost that might give them a fresh start. Nat'l Advisory Comm's on Civil Disorders. Report, 253 (1968)

As in the case of the period of residency required to qualify for welfare payments, the condition has been attached to public housing eligibility, theoretically at least, to prevent an influx of the poor into a particular locality solely to obtain public housing not available at their former residence ...

Moreover, serious doubt exists as to the constitutionality of the residency requirement. Such tests in welfare assistance programs have been held unconstitutional by several federal district courts and recently by the Supreme Court, on the grounds that they infringe upon the constitutionally protected freedom of movement and that such a test violates the fourteenth amendment's equal protection clause.[9] Similar attacks can be made on the minimum residency requirements for public housing eligibility.

Since public housing is state action it may be argued, on the basis of the Supreme Court's Shapiro v. Thompson decision, that the imposition of a period of residency requirement impedes freedom of interstate movement. Shapiro involved the constitutionality of state statutes which denied welfare assistance to indigents who had not resided in that state or locality for a minimum period of time. The state admittedly enacted the statute to protect its treasury from the drain which would result from the heavy influx of indigents. The Court held, however, that the purpose of inhibiting indigents from entering the state was an unconstitutional deprivation of the right to travel.

The residency requirement in public housing is probably equally as direct a burden on state to state freedom of movement as the statutes in Shapiro. An indigent will be much less likely to move to another jurisdiction where he might have greater job opportunities, when he realizes that he will be unable for a certain period of time to obtain decent housing which he can afford....

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[9] Shapiro v Thompson, 89 S. Ct. 1322 (1969)

The effect of the various fixed period residency requirements is to relegate needy families to slum housing for the particular time period established, even though they otherwise qualify under the Housing Act. To deny public housing to those families, if units are available, is unconscionable and certainly contrary to all enunciated national housing and anti-poverty goals. The otherwise harsh effect of the residency requirement would be ameliorated in areas where because of a shortage, public housing would not be available to a new resident for a substantial period of time in any event. In this situtation, however, a minimum period of residency is not required; the shortage serves to accomplish whatever purpose the residency requirement is intended to serve. But even within an area experiencing a shortage of public housing units, the residency requirement can still produce harsh results.

Admission. The former eligibility requirements of the New York City Housing Authority (NYCHA) are probably the most refined aggrandizement of a desirability standard. The NYCHA Resolution stated that a ground for admissibility was whether the applicant would be a "desirable tenant." The standard that was used to determine desirability set out five prohibitions:

> (T)he family will not or does not constitute (1) a detriment to the health, safety or morals of its neighbors or the community, (2) an adverse influence upon sound family and community life, (3) a source of danger to the peaceful occupation of the other tenants, (4) a source of danger or cause of damage to the premises or property of the Authority, or (5) a nuisance.

The Resolution then stated:

> In making such determination consideration shall be given to the family, parental control over children, family stability, medical and other past history, reputation, conduct and behavior, criminal record if any, occupation of wage earners, and any other data or information with respect to the family that has a bearing upon its desirability...

Recently the NYCHA promulgated new standards for admission. The most essential change is in the new standards from which "(t) he exercise of moral judgment is precluded." But this is no more than an enlightened first step; many other Authorities throughout the country still retain standards or eligibility other than low income.

Illegitimacy is the most prominent obstacle barring admission to public housing projects under the guise of the desirability standard. The recent case of Thomas v. Housing Authority exposed a directive of the Little Rock, Arkansas Local Authority providing that a person" ... having children born out of wedlock shall not be eligible for admission or continued occupancy."

The Los Angeles Housing Authority considers common-law marraige as a basis for the denial of admission, even while recognizing that common-law marriage, per se, is not conclusive proof of an unstable family. This policy is premised upon two considerations. The ACC requires a "family unit", supposedly excluding living groups of unrelated persons, and the California law does not recognize common-law marriages. A provision of this nature not only seems irrelevant to the goals of the Public Housing Act; it ignores the findings of modern sociology that this type of institutional arrangement is often the rule in low-income Negro neighborhoods.

The standards of undesirability, whether formally enunciated or informally applied, are the "very badges of the poor" for whom public housing is designed. The application of these standards operates in many cases to deny decent housing to those most in need. One can choose any of the grounds which may disqualify an applicant and demonstrate that such conditions are more prevalent among the poor. Such factors as a record of poor rent payment or eviction from private housing for nonpayment of rent, illegitimate children, a history of irregular employment, the separation of husband and wife twice in the previous five years, lack of parental control over children, and placement of children with relatives or agencies have disqualified potential applicants.

The incongruous situation is created whereby these conditions, normally associated with so-called "problem families," the alleviation of which is a basic rationale for the existence of public housing, are the very grounds for denying them housing. The basic goal of public housing cannot be achieved by requiring those whose morals may have been affected or molded by their slum environment to remain in that environment. Furthermore, the entire history of low-cost housing legislation is benefit of any requirement that an applicant prove his moral worthiness to obtain the benefits of the housing program. The sole question should be: Is this family in need of low cost housing? Any program which makes need secondary to a determination of desirability is inconsistent with the statutory purpose of public housing laws ...

Recommendations

Standardized and uniform rules. As a first step in imposing definite eviction rules upon Local Authorities, HUD should implement its circular of February 7, 1967 which provided that a public housing lease can be terminated by the Local Authority only for cause. Such a provision should be included in the lease, thus making the tenancy one for an indefinite or indeterminate term with the tenant permitted to terminate upon giving reasonable notice.

Substantive grounds for lease termination. It has been suggested that the reason for eviction should be limited to those commonly accepted in the private housing sector -- those recognized at common law and under statutory summary proceedings for the premature termination of a fixed period tenancy. Absent a lease clause on the subject the common law recognized the lessor's power to terminate an estate for years upon the lessee's use of the premises in an illegal manner, for an illegal purpose, or in a manner constituting a nuisance. "Common-law" legislation and more recent statutes also provide for forfeiture of an estate for waste either permitted or committed by a tenant for years.

The usual ground for terminating a tenancy in summary proceedings is nonpayment of rent. This legal cause should be ameliorated in public housing tenancies. The legislature should recognize the often recurring financial straits of low-income public housing tenants and institute a partial payment or late payment plan to accommodate tenants who are experiencing financial difficulties arising from causes other than their own personal neglect, frivolity, or mismanagement. This ground for termination should be limited to chronic nonpayment of rent resulting from gross tenant irresponsibliity.

These substantive standards would preclude the Authority management from judging the moral worthiness or fitness of its tenants, a practice entirely alien to the objective of providing safe, decent, sanitary housing for all. The argument has been made, however, that this restriction on management's power would seriously threaten the efficient operation and economic viability of the project. If this is true, the answer is two-fold; first, a successful public housing program requires substantial infusion of rehabilitative social services -- just providing adequate physical facilities will not rehabilitate our poor -- and, second, the economic viability and financial independence of local housing projects may not be consonant with the overall objectives of the housing and anti-poverty programs.

III. PROCEDURAL DUE PROCESS

Any proposed resolution of the substantive problems in public housing will be futile if it does not provide for due process safeguards. Making management the sole judge of nuisance, waste, and substantial interference with fellow tenants would merely be giving it another license for arbitrary action. The right of the tenant to notice the evidence against him, as well as the right to a reasonable opportunity to rebut that evidence are fundamental safeguards, necessarily available to those who deal with government, against the impersonality inherent in any large public or private organization.

For example, if HUD were to declare that income was to be the sole criterion for determining eligibility for admission and continued tenancy, tenants were not apprised of this declaration, and the Local

Authority continued to be the sole judge of eligibility without adequate provisions for an independent review of its determination or notice of pending action, such a declaration would clearly be of little value to public housing dwellers. Presently, however, admissions, evictions, and other determinations potentially adverse to the tenants' interests are usually decided without the benefit of published guidelines, adequate notice of the charges against the tenant, an established evidentiary standard of burden of proof, a review by an impartial tribunal, and often without an opportunity to appear before, and be heard by, the officials who make these decisions.

This study has catalogued the areas in which tenants' rights and liabilities are decided on a purely discretionary ex parte basis. These arbitrary parctices, in large measure, are the result of the federal policy of vesting complete, and nearly unreviewable, discretion in the Local Authorities. The substantive illegality of these policies has been dealt with above; this section will discuss the application of procedural due process to Local Authority determinations.

The Constitution Basis

Since public housing authorities are government agencies, their activities must conform with due process of law. Both state and federal courts have recognized that federally-funded, state-created housing authorities are subject to the due process clause of the fourteenth amendment. The principle was well-stated by the District of Columbia Circuit Court of Appeals in Rudder v. United States. In rejecting the claim that a housing authority has the same freedom to evict tenants as a private landlord, the court said:

> The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process.

IV. UNFAIR MANAGEMENT PRACTICES

Great injustices exist in the day-to-day management of public housing projects due to the almost unlimited discretion of the Local Authority in this area. Tenants' complaints of arbitrary practices include: fees and charges imposed on tenants for infraction of project rules, for late payment of rent, or for "key loans" when tenants have locked themselves out; assessments for repairs when no culpability on the part of the tenant has been established, repair charges added to rent, thereby subjecting tenants to summary eviction for failure to pay such charges; threats of illegal eviction; invasion of privacy of tenants' dwellings; inadequate utility allowances in leases resulting in added charge to tenants, charging of security deposits; and ineffectively promulgated rules and regulations. A major cause of these widespread practices is the lack of administrative guidelines for management. The HUD guidelines are restricted to technical, clerical, or record-keeping assistance. More specific standards may be imposed at the local level; generally, however, managers are given considerable latitude and power in running the project.

Another major source of irritation is the structure of the graded rent system. Tenants resent paying a large percent of their pay increases for additional rent.[10] Charging back rent to tenants who fail to report income increases, including the income of secondary wage earners in computing rents, and using the same rent scale for older dwellings as for newer, more desirable dwellings are other sources of resentment. To reduce the confusion and irritation caused by rent adjustment, management should conduct income checks and make reassessments on an annual basis rather than requiring tenants to report interim changes in income. In addition, modifications are needed regarding secondary income in order to provide greater incentive to increase family income . . . .

Recommendations

Uniform, nation-wide regulation. In order to eliminate the great diversity in managerial practices and to restrict the latitude and power in operation presently vested in project managers HUD must take a more active and direct role in the supervision of project operations. A necessary first step toward this goal is the standardization of rules and regulations governing day-to-day project management.

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[10] They also resent being evicted for "overincome."

It has been charged that project managers and other personnel who are property oriented by background and inclination, are concerned primarily with the operation and maintenance of physical property and are not attuned to the socio-legal rights and demands of tenants. Since public housing should be heavily committed to rehabilitating the dependent poor, the qualifications and criteria of project managerial staffs should be reexamined and a reorientation program instituted where necessary.
In addition, federal guidelines as to qualifications and background for employment should be promulgated to guide Local Authorities in the selection of sociologically oriented and properly motivated personnel.

This federal formalization of internal procedures and practices should be carried out with a view to enlarging the self-respect and dignity of tenants and minimizing the undue concern for physical project property. To reach this goal the breadth of the regulations should be substantially reduced. Supervision over tenants should at least be limited to those areas commonly regulated by private landlords and should be accompanied by uniform procedural rules which will provide adequate safeguards for due process and review.

Increased tenant involvement. To ameliorate hostile management-tenant relationships, to instill pride, dignity, and a sense of self-determination in tenants, and tominimize arbitrary and capricious management practices, tenants should be afforded meaningful participation with management in every day project operation. Tenant involvement can take several forms -- for example, the creation of separate tenant organizations to be recognized as legitimate bargaining agents for tenants, tenant participation with management officials on commissions which would handle a mayriad of operational tasks such as setting and enforcing regulations, and acting on grievances concerning management. Long-range plans should include the consideration of alternatives to the present public housing program. The desirability of centralized management can be seriously questioned. Among the proposals being explored is the creation of small owning-managing corporations eligible to receive subsidies conditioned upon specified rental and operating policies. Perhaps rent subsidies or a guaranteed annual income will provide a viable alternative to the present programs. It has also been suggested that it might be less expensive and more conducive to family responsibility if subsidies were given for the purchase of family homes rather than for rentals. A more moderate proposal is that the practice of forcing overincome tenants out of public housing should be discontinued in favor of permitting continued occupancy at slightly increased rentals.

Elmination of financial sanctions. The arbitrary and unjust system of assessing financial sanctions and collecting them as part of rent must cease. An action for rent or for possession based on non-payment of rent should be limited to that sum of money which the tenant is required to pay based on his income pursuant to established and approved rent schedules. Further, a tenant's liability for repairs ought not be more than a private tenant's responsibility, which is customarily limited to repairs indisputably occassioned by active commission of waste or through negligence. In assessing charges adequate safeguards for due process and appeal procedures are essential. If procedural safeguards are not established the tenant must be afforded a trial de novo to determine his liability and the reasonableness of the charge.

Other than liability for waste, assessment of fees, fines, and other financial sanctions should be abolished. These strictly penal charges are not customarily assessed in private low-income housing arrangements and are certainly incompatible with the objectives of this nation's housing and poverty programs.

Recommendations

A model low-income lease must recognize and attempt to further the goals of public housing. Public housing legislation is not intended to protect landlords; its purpose is to aid indigent tenants by providing them with a decent, safe environment at a rental they can afford. Rather than fostering these ideals, however, current leases restrict the rights of tenants and insulate the liability of their landlords. To establish a cooperative management-tenant relationship and to reflect the intent of public housing legislation, leases must be based on three cardinal principles: clarity, brevity, and mutuality of obligation.

1. A necessary first step toward the creation of a more equitable landlord-tenant relationship is the excision or amelioration of the unconscionable causes . . . The lease should take the form of a mutual contract with privileges and obligations for both parties.[11]

2. At present, and traditionally, leases are written in a form of legalese which is baffling to layment and unclear to many lawyers. If a tenant is expected to accept his responsibilities under the lease, he must first understand them; therefore, the lease terms should be expressed in a clear, concise manner.

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[11] An example of a private housing clause which adequately expresses mutuality of obligation is the following:

The landlord recognizes his continuing obligation to maintain this property. The landlord agrees that he or his duly appointed agent will inspect the premises subject of this agreement at least twice yearly during daylight hours or by special appointment, to note conditions and to arrange for the immediate correction of those conditions which fall within the landlord's responsibility in accordance with this agreement. The tenant hereby agrees to permit the inspection of these premises twice yearly and as well when emergency requires, and to arrange and pay for the immediate correction of those conditions which have been caused by his negligence or that of his invitees. The tenant further agrees to notify the

3. If management's rules and regulations are not contained in the lease, a copy of them should be furnished to the tenant when the lease is signed. The tenant should be orally notified of the presence of these rules, and themore important ones, such as conditions of occupancy, should be explained to him.

VI. CONCLUSION

Born of a New Deal concern for those temporarily dispossessed by the Depression, the American system of public housing has found itself at the core of a new social context, including changes in tenants and their expectations. Serious conflicts, which must be resolved by the judiciary and the legislatures, have resulted from these changes. The preceding discussion has reviewed four major legal problems confronting public housing tenants: sub-standard housing conditions, unreasonable admission and eviction standards, unfair management practices, and unconscionable lease terms.

To the extent that sub-standard public housing is allowed to stand, it is susceptible to the Supreme Court's indictment of privately owned slums. "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality . . . They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn."[12]

When tenants are subjected to unreasonable and irrelevant standards for admission and eviction, the public housing system perverts its reason for being. The care of those citizens who cannot find shelter in the private sector should be the central motivation of Local Authorities. When admission and evic-

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landlord of conditions which require corrections. Fed. Bar Assn., Model Rental Agreement, 57 Geo. L. J. 480, paragraph 7 (1968).

[12] Berman v. Parker, 348 U. S. 26, 32-33 (1954).

tion practices seek to accomplish any other goal, they illegitimately discriminate against the poor.

Unfair management practices and unconscionable lease terms are cruel deceptions of those who are often without any effective bargaining power. The inability of the poor to utilize the tools of the marketplace is exacerbated when the power of the state lies behind an inequitable contract. The misery arising from the physical deficiences of many projects is aggravated by irrelevant regulations imposed by the management.

These injustices must be corrected if the public housing system is to fulfill its promise of twenty years ago to the Nation's indigent. It is no adequate defense to demonstrate that problems have arisen from changes in the social milieu. The requirements of the general welfare have always been a function of social change.

C. THE TENANT'S RIGHTS

THORPE v. HOUSING AUTHORITY OF THE CITY OF DURHAM*

393 U. S. 268 1 89 S.Ct. 518
(1969)

Mr. Chief Justice Warren delivered the opinion of the Court.

This case raises the question whether a tenant of a federally assisted housing project can be evicted prior to notification of the reasons for the eviction and without an opportunity to reply to those reasons, when such a procedure is provided for in a Department of Housing and Urban Development (hereinafter HUD) circular issued after eviction proceedings have been initiated.

On November 11, 1964, petitioner and her children commenced a month-to-month tenancy in McDougald Terrace, a federally assisted, low-rent housing project owned and operated by the Housing Authority of the City of Durham, North Carolina. Under the lease, petitioner is entitled to an automatic renewal for successive one-month terms, provided that her family composition and income remain unchanged and that she does not violate the terms of the lease.[1] The lease also provides, however, that either the tenant or the Authority may terminate the tenancy by giving notice at least 15 days before the end of any monthly term.[2]

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[1] "This lease shall be automatically renewed for successive terms of one month each at the rental last entered and acknowledged below .... Provided, there is no change in the income or composition of the family of the tenant and no violation of the terms hereof. In the event of any change in the composition or income of the family of the tenant, rent for the premises shall automatically conform to the rental rates established in the approved current rent schedule which has been adopted by the Management for the operation of this Project...."

[2] "This lease may be terminated by the Tenant by giving to Management notice in writing of such termination 15 days prior to the last day of the term. The Management may terminate this lease by giving to the Tenant notice in writing of such termination fifteen (15) days prior to the last day of the term. Provided, however, that this paragraph shall not be construed to prevent the termination of this lease by Management in any other method or for any other case set forth in this lease."

The Housing Authority construes this provision to authorize termination upon the giving of the required notice even if the

*Footnotes have been edited and renumbered.

On August 10, 1965, petitioner was elected president of a McDouglad Terrace tenants' organization called the Parents' Club. On the very next day, without any explanation, the executive director of the Housing Authority notified petitioner that her lease would be canceled as of August 31.[3] After receiving notice, petitioner attempted through her attorneys, by phone and by letter, to find out the reasons for her eviction. Her inquiries went unanswered, and she refused to vacate.

On September 17, 1965, the Housing Authority brought an action for summary eviction in the Durham Justice of the Peace Court, which, three days later, ordered petitioner removed from her apartment. On appeal to the Superior Court of Durham County, petitioner alleged that she was being evicted because of her organizational activities in violation of her First Amendment rights. After a trial de novo,[4] the Superior Court affirmed the eviction, and the Supreme Court of North Carolina also affirmed. Both appellate courts held that under the lease the Authority's reasons for terminating petitioner's tenancy were immaterial. On December 5, 1966, we granted certiorari to consider whether petitioner was denied due process by the Housing Authority's refusal to state the reasons for her eviction and to afford her a hearing at which she could contest the sufficiency of those reasons.

On February 7, 1967, while petitioner's case was pending in this Court, HUD issued a circular directing that before instituting an eviction proceeding local housing authorities operating all federally assisted projects should inform the tenant "in a private conference or other appropriate manner" of the reasons for the eviction and give him "an opportunity to make such reply or explanation as he may wish."[5] Since the application of this directive

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tenant has not violated the terms of the lease and his income and family composition have not changed. Petitioner, however, insists that since the Authority is a government agency, it may not constitutionally evict "for no reason at all, or for an unreasonable, arbitrary and capricious reason ...." Brief for Petitioner 27. We do not, however, reach that issue in this case. See n. 49, infra.

[3] The text of the notice is as follows:

"Your Dwelling Lease provides that the Lease may be cancelled upon fifteen (15) days written notice. This is to notify you that your Dwelling Lease will be cancelled effective August 31, 1965, at which time you will be required to vacate the premises you now occupy."

[4] All of the essential facts were stipulated in the Superior Court including:

"that if Mr. C. S. Oldham, the Executive Director of the Housing Authority of the City of Durham, were present and duly sworn to petitioner would render a decision on the constitutional issues she raised unnecessary, we vacated the judgment of the Supreme Court of North Carolina and remanded the case "for such further proceedings as may be appropriate in the light of the February 7 circular of the Department of Housing and Urban Development."

On remand, the North Carolina Supreme Court refused to apply the February 7 HUD circular and reaffirmed its prior decision upholding petitioner's eviction. Analogizing to the North Carolina rule that statutes are presumed to act prospectively only, the court held that since "(a)ll critical events" had occurred prior to the date on which the circular was issued "(t)he rights of the parties had matured and had been determined before ..." that date. We again granted certiorari. We reverse the judgment of the Supreme Court of North Carolina and hold that housing authorities of federally assisted public housing projects must apply the February 7, 1967, HUD circular before evicting any tenant still residing in such projects on the date of this decision.[6]

DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
Washington, D. C. 20410

Circular
2-7-67

Office of the Assistant Secretary
For Renewal and Housing Assistance
TO: Local Housing Authorities
Assistant Regional Administrators for Housing Assistance
HAA Division and Branch Heads
FROM: Don Hummel
SUBJECT: Terminations of Tenancy in Low-Rent Projects

Within the past year increasing dissatisfaction has been expressed with eviction practices in public low-rent housing projects. During that period a number of suits have been filed through the United States generally challenging the right of a Local Authority to evict a tenant without advising him of the reasons for such eviction.

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and were testifying, he would testify that whatever reason there may have been, if any, for giving notice to Joyce C. Thorpe of the termination of her lease, it was not for the reason that she was elected president of any group organized in McDougald Terrace, and specifically it was not for the reason that she was elected president of any group organized in McDougald Terrace on August 10, 1965 ...."

[5] The full text of that circular is as follows:

Since this is a federally assisted program, we believe it is essential that no tenant be given notice to vacate without being told by the Local Authority, in a private conference or other appropriate manner, the reasons for the eviction, and given an opportunity to make such reply or explanation as he may wish. In addition to informing the tenant of the reason(s) for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from its federally assisted public housing. Such records are to be available for review from time to time by HUD representatives and shall contain the following information:

1. Name of tenant and identification of unit occupied.
2. Date of notice to vacate.
3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that eviction should be instituted.
4. Date and method of notifying tenant with summary of any conferences with tenant, including names of conference participants.

In support of the North Carolina judgment, the Housing Authority makes three arguments: (1) the HUD circular was intended to be advisory, not mandatory; (2) if the circular is mandatory, it is an unauthorized and unconstitutional impairment of both the Authority's annual contributions contract with HUD and the lease agreement between the Authority and petitioner; and (3) even if the circular is mandatory, within HUD's power, and constitutional, it does not apply to eviction proceedings commenced prior to the date the circular was issued. We reject each of these contentions.

I

Pursuant to its general rule-making power under § 8 of the United States Housing Act of 1937, HUD has issued a Low-Rent Management Manual which contains requirements that supplement the provisions of the annual contributions contract applicable to project management. According to HUD, these requirements "are the minimum considered consistent with fulfilling Federal responsibilities" under the Act. Changes in the manual are initially promulgated as circulars. These circulars, which have not yet been physically incorporated into the manual are temporary additions or modifications of the manual's requirements and "have the same effect." In contrast, the various "handbooks" and "booklets" issued by HUD contain mere "instructions," "technical suggestions," and "items for consideration."

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[5] Date and description of final action taken.

The Circular on the above subject from the PHA Commissioner, dated May 31, 1966, is superseded by this Circular.

s/Don Hummel
Assistant Secretary for Renewal
and Housing Assistance

The import of that language, which characterizes the new notification procedure as "essential," becomes apparent when the February 7 circular is contrasted with the one it superseded. The earlier circular, issued on May 31, 1966, stated: "(W)e strongly urge, as a matter of good social policy, that Local Authorities in a private conference inform any tenants who are given ... (termination) notices of the reasons for this action." (Emphasis added.) This circular was not incorporated into the Management Manual.

That HUD intended the February 7 circular to be mandatory has been confirmed unequivocally in letters written by HUD's Assistant Secretary for Renewal and Housing Assistance[7] and by its Chief Counsel. Thus, when the language and HUD's treatment of the February 7 circular are contrasted with the language and treatment of the superseded circular, there can be no doubt that the more recent circular was intended to be mandatory, not merely advisory, as contended by the Authority.

II

Finding that the circular was intended to be mandatory does not, of course, determine the validity of the requirements it imposes....

... The circular imposes only one requirement: that the Authority comply with a very simple notification procedure before evicting its tenants. Given the admittedly insubstantial effect this requirement has upon the basic lease agreement under which the Authority discharges its management responsibilities, the contention that the circular violates the congressional policy of allowing local authorities to retain maximum control over the administration of federally financed housing projects is untenable....

Likewise, the lease agreement between the Authority and petitioner remains inviolate. Petitioner must still pay her rent and comply with the other terms of the lease; and as the Authority itself acknowledges, she is still subject to eviction. HUD has merely provided for a particular type of notification that must precede eviction; and "(i)n modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy

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[6] The Supreme Court of North Carolina stayed the execution of its judgment pending our decision. As a result, petitioner has not yet vacated her apartment.

[7] "(W)e intended it to be followed .... The circular is as binding in its present form as it will be after incorporation in the manual ... HUD intends to enforce the circular to the fullest extent of its ability ..." Letter from Assistant Secretary Don Hummel to Mr. Charles S. Ralston of the NAACP Legal Defense and Educational Fund, Inc., July 25, 1967.

or so embarrass it with conditions or restrictions as seriously to impair the value of the right."[8]

Since the Authority does not argue that the circular is prescribed by any constitutional provision other than the Due Process Clause, the only remaining inquiry is whether it is reasonably related to the purposes of the enabling legislation under which it was promulgated. One of the specific purposes of the federal housing acts is to provide "a decent home and a suitable living environment for every American family,"[9] that lacks the financial means of providing such a home without governmental aid. A procedure requiring housing authorities to explain why they are evicting a tenant who is apparently among those people in need of such assistance certainly furthers this goal. We therefore cannot hold that the circular's requirements bear no reasonable relationship to the purposes for which HUD's rule-making power was authorized.

III

The Housing Authority also urges that petitioner's eviction should be upheld on the theory relied upon by the Supreme Court of North Carolina: the circular does not apply to eviction proceedings commenced prior to its issuance. The general rule, however, is that an appellate court must apply the law in effect at the time it renders its decision. Since the law we are concerned with in this case is embodied in a federal administrative regulation, the applicability of this general rule is necessarily governed by federal law....

The Authority admitted during oral argument that it has already begun complying with the circular. It refuses to apply it to petitioner simply because it decided to evict her before the circular was issued. Since petitioner has not yet vacated, we fail to see the significance of this distinction. We conclude, therefore, that the circular should be applied to all tenants still residing in McDouglad Terrace, including petitioner, not only because it is designed to insure a fairer eviction procedure in general, but also because the prescribed notification is essential to remove a serious impediment to the successful protection of constitutional rights.

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[8] We have consistently upheld legislation that affects contract rights far more substantially than does the HUD circular. E. g., El Paso v. Simmons, supra, upheld a state statute that placed a time limit on the right to reinstate a claim in previously forfeited public lands; East N. Y. Sav. Bank v. Hahn, 326 W. S. 230 (1945), upheld a New York statute suspending mortgage foreclosures for the 10th year in succession; and Blaisdell upheld a statute that extended mortgagors' redemption time.

There is no reason why the principles that control legislation that affects contractual rights should not also control administrative rule-making that affects contractual rights.

IV

Petitioner argues that in addition to holding the HUD circular applicable to her case, we must also establish guidelines to insure that she is provided with not only the reasons for her eviction but also a hearing that comports with the requirements of due process. We do not sit, however, "to decide abstract, hypothetical or contingent questions ... or to decide any constitutional question in advance of the necessity for its decision ..." The Authority may be able to provide petitioner with reasons that justify eviction under the express terms of the lease. In that event, she may decide to vacate voluntarily without contesting the Authority's right to have her removed. And if she challenges the reasons offered, the Authority may well decide to afford her the full hearing she insists is essential. Moreover, even if the Authority does not provide such a hearing, we have no reason to believe that once petitioner is told the reasons for her eviction she cannot effectively challenge their legal sufficiency in whatever eviction proceedings may be brought in the North Carolina courts. Thus, with the case in this posture, a decision on petitioner's constitutional claims would be premature.[10]

Reversed and remanded.

Mr. Justice Black, concurring.

The Court here uses a cannon to dispose of a case that calls for no more than a popgun. The Durham Housing Authority has clearly stated, both in its brief and at oral argument, that it is fully complying with the directive of the Department of Housing and Urban Development concerning notice to tenants of reasons for their eviction. The only possible issue therefore is whether the directive should apply to Mrs. Thorpe, against whom eviction proceedings were started prior to the effective date of the HUD memorandum but who is still residing in public housing, as a result of judicial stays. I agree, of course, that the directive should apply to her eviction. Nothing else need be decided.

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[9] Section 1 of the Housing Act of 1949, 63 Stat. 413, 42 U. S. C. § 1441. That section further directs all agencies of the Federal Government "having powers, functions, or duties with respect to housing .... (to) exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act ...." Ibid.

[10] These same considerations lead us to conclude that it would be equally premature for us to reach a decision on petitioner's contention that it would violate due process for the Authority to evict her arbitrarily. That issue can be more appropriately considered if petitioner is in fact evicted arbitrarily. See Alabama State Federation of Labor v. McAdory, supra.

Comment: The Problems of Eviction for the Public Housing Tenant.

There are special and very difficult problems which face any low income tenant evicted from his housing. However, the public housing tenant has an even more onerous burden to bear. There are two basic problems. The first is that it may be almost impossible for the tenant to find new housing at anything near the low rental he was paying to the housing authority. At the best, he can find housing for the same price only by taking the lowest quality shelter. A second problem, is that once evicted from public housing the possibility of ever getting public housing again may be very dim. See "Public Landlords and Private Tenants," 77 Yale 988, 1968.

D. Discrimination in Site Selection and Tenant Placement.

Site selection for public housing has taken place through the political process in most cities. Most middle class neighborhoods have successfully fought attempts to place public housing in their areas. The result is almost exclusive placement of public housing in low-income neighborhoods already overcrowded and with no political impact of their own to stop construction which might further overload the services in the neighborhood. The massive imigration of black citizens to the cities and the causes of economic discrimination and segregated housing patterns has clearly made site selection of public housing a question fraught with racial overtones. An additional question is discrimination in placement of families in public housing.

Gatreux v. The Chicago Housing Authority, which follows, indicates one approach which may be taken to force the racial issues in public housing clearly under the Civil Rights Laws. The case is still in the courts and the exact remedy being negotiated.

GATREUX v. THE CHICAGO HOUSING AUTHORITY 1969

Judge Austin for the Court.

Plaintiffs, Negro tenants in or applicants for public housing sue on behalf of themselves and all others similarly situated alleging that defendants, The Chicago Housing Authority (CHA), a municipal corporation, and C.E. Humphrey, Executive Director of CHA, have violated their rights under the Fourteenth Amendment of the Constitution of the United States. Count 1 charges that defendants intentionally chose sites for family public housing and adopted tenant assignment procedures in violation of 42 U.S.C., Secs. 1981 and 1983 for the prupose of maintaining existing patterns of residential separation of races in Chicago.

I. Discriminatory Tenant Assignment Practices.

Plaintiffs charge that dependants have imposed quotas at four White family housing projects to keep the number of Negro families to a minimal level.

The Trumbull, Lathrop, Lawndale and Bridgeport projects were built before 1944 in areas which were then and are now substantially all White. Baron Affidavit, Exhibit A. Until 1954 CHA refused to permit Negro Families to reside in these projects. Statement of Elizabeth Wood, Head of CHA until August 23, 1954. The Negro population in the four projects on December 31, 1967 represented respectively about 7%, 4%, 6% and 1% of the total. Stipulation, July 29, 1968. At present, Negroes comprise about 90% of the tentnts in CHA family housing projects and about 90% of the waiting list of 13,000 persons. CHA Sept. 20 Brief, p.7, p. 18.

The disparity between the low number of Negro families in these projects and the high number of Negro applicants for all projects indicates that CHA has imposed a Negro quota. Alvin Rose, Executive Director (chief executive officer) of CHA from September 1957 to November 1967, testified on deposition that CHA devised "elastic quotas" (p. 173) at the four projects which can more accurately be "fixed" (p. 180). Harry Schneider, Deputy Executive Director of CHA, formerly Director of Management from May 1950 to January 1968, testified that until May 22, 1968 these four projects were listed on CHA tenant selection forms as appropriate for "A families only," that is, Whites only. Schneider Dep., p. 77. He states that in these projects there are "controls" on the number of Negro applicants accepted (p. 75), that Negro population in these projects is now "fairly close" to the "appropriate maximum number" (p. 78), and that if, for example Trumbull attained the level of 35 Negro families, a "hold" would maintain the occupancy at that level (p 84). Mrs. Lousie Webb, in charge of processing tenant applications for CHA, confirms Mr. Schneider's testimony that quotas are now in force. Webb Dep. p.61.

CHA does not contradict these statements of its own officials. The "history of tension, threats of violence and violence" urged in justification by CHA cannot excuse a governmentally established policy of racial segregation. Cooper v. Aaron, 358 U. S. 1 (1958). In fact, the only violent incident mentioned by Mr. Schneider occurred in 1953, and Mr. Rose recalled that one incident indicating White hostility to Negroes occurred at Bridgeport in 1959. Schneider Dep., p. 63; Rose Dep., p. 163. Precautions taken in the wake of these incidents such as notifying the police and Human Relations Commission are no longer taken when Negroes are moved into the White projects. Schneider Dep., p. 82. These remote incidents do not show a clear threat of violence which might justify quotas as a very temporary expedient. In any case, CHA's quotas clearly have maintained Negro occupancy at a permanently low level. Therefore, plaintiffs are entitled to appropriate relief against the defendants' policy of denying applications to the four projects on the basis of racial quotas. Detroit Housing Commission v. Lewis, 226 F. 2d 180 (6th Cir. 1955).

II. Discriminatory Site Selection Procedures.

In choosing sites for public housing, the CHA is directed by statute to follow these criteria:

> (E)limination of unsafe and unsanitary dwellings, the clearing and redevelopment of blighted and slum areas, the assembly of improved and unimproved land for development or redevelopment purposes, the conservation and rehabilitation of existing housing, and the provision of decent, safe, and sanitary housing accommodations. Ill. Rev. Stat., Ch. 65½, Sec. 8.2.

The City Council must approve all sites before they are acquired. Ill. Rev. Stat., Ch. 67½, Sec. 9. However, CHA is not compelled to acquire or build upon all sites thus approved. Humphrey Dep., p. 107.

Plaintiffs charge that the procedure mainly used by defendants to maintain existing patterns of racial residential separation involved a pre-clearance arrangement under which CHA informally submitted sites for family housing to the City Council Alderman in whose Ward the site was located. CHA admits the existence of this procedure. E. G., Humphrey Aff't, p. 7. The Aldermen to whom White sites were submitted allegedly vetoed these sites because the 90% Negro waiting list and occupancy rate would create a Negro population in the White area. Plaintiffs allege that the few White sites which escaped an Alderman's informal veto were rejected on racial grounds by the City Council when they were formally submitted by CHA for approval.

A. Statistics on Sites Considered and Selected

As of July, 1968, CHA had in operation or development 54 family projects at 64 sites in Chicago consisting of 30,848 units. CHA Sept. 20 Brief, p. 7, (adopting figures in Baron Aff't submitted by plaintiffs). Exclusive of the four segregated White projects, CHA's family housing tenants are 99% Negroes. Stipulation, July 29, 1968. Exclusive of the four projects, housing units now located in neighborhoods' between 50% and 100% Negro represent 99½% of the total units operated by CHA; units in neighborhoods between 75% and 100% Negro are 92% of the total; and units in areas over 95% Negro are two-thirds of the total. A glance at a map depicting Negro areas of residence in Chicago confirms that the 50% to 90% Negro areas are almost without exception contiguous with 90% to 100% Negro areas and that the relatively small numbers of Chicago Negroes not concentrated in the over 90% areas are almost entirely concentrated in the over 50% areas. Therefore, given the trend of Negro population movement, 99½% of CHA family units are located in areas which are or soon will be substantially all Negro. It is incredible that this dismal prospect of an all Negro public housing system in all Negro areas came about without the persistent application of a deliberate policy to confine public housing to all Negro or immediately adjacent changing areas.

To sustain their burden of proving that defendants' past and present policies have deprived them of their constitutional rights, plaintiffs contend that, during the consideration of each of the five major family housing programs since 1954, White sites meeting all appropriate criteria were rejected for racial reasons. Mr. Humphrey's affidavit sets forth (a) the total number of sites initially selected by CHA which met criteria of slum clearance, cost limitations, accessibility to public facilities, and overall metropolitan planning (b) White sites initially selected which met these same criteria (c) the number of apartment units planned for the White sites initially selected as a percentage of the total apartment units planned for all sites selected, (d) White sites finally approved by the City Council and (e) Negro sites approved.

	(a) Sites Initially Selected	(b) White Sites Initially Selected	(c) Per Cent of Units in White Sites Initially Selected	(d) White Sites Approved	(e) Negro Sites Approved
1955 Program	25	4	45%	0	19
1956 Program	11	4	30%	0	5
1958 Program	11	2	31%	0	7
1965 Program	18	9	50%	0	9
1966 Program	38	22	50%	2	9

Mr. Humphrey estimates that the sites selected initially by CHA for the five programs totaled 7,883 White housing units and 10,901 Negro units for a total of 18,784 units. One of the two White sites finally approved in 1966 included 400 units and was located on vacant land bounded on one side by a predominantly Negro area and partially occupied by dilapidated Negro shacks. Humphrey Dep. II, p. 190. The mere fortunity that this site was included in a 72.8% White census tract does not make it relevant to negate the inference of a policy against choosing sites in White neighborhoods. The other White site approved in 1966 was planned for 36 units. CHA did not proceed formally to submit for City Council approval seven White sites in 1965 because "the Aldermen in whose Wards those sites were located advised of community opposition and indicated they were opposed to such sites in their Wards." Humphrey Aff't, p. 6. One White site in the 1965 program was not submitted to the City Council because the City Department of Development and Planning advised against its acquisition, presumably because it conflicted with other urban planning projects. The only White site formally submitted was dropped from consideration by the City Council Committee on Planning and Housing. In 1966, the Department of Development and Planning advised against all 20 of the White sites not formally submitted because it "either (a) disapproved the site, (b) recommended deferment of (c) advised of Aldermanic opposition.' Humphrey Aff't, p. 9. Since the Department merely assumed CHA's admitted former role in the pre-clearance procedure, it must be inferred in the absence of a suggestion to the contrary by defendants that only a minimal number of White sites in 1966 were disapproved because they conflicted with other urban development projects.

Additional family sites not included in the five programs were developed in 1963 in a Negro neighborhood (346 units) and in 1965 in two White neighborhoods (12 units). CHA also operates 5,050 units of public housing for elderly persons of which 54½% are in substantially White neighborhoods. Fifty-seven per cent of 2,047 elderly housing units presently in development are in White neighborhoods. The Illinois statutory procedures applying to family housing projects, including the requirement of City Council approval, apply also to elderly housing projects. (Plaintiff's Complaint is not directed to elderly housing.) But the relatively equal distribution between White and Negro elderly housing sites actually developed arises from circumstances which are not applicable to family housing sites. In selecting tenants for elderly housing Mr. Rose conceived a "proximity rule" under which the applications of persons living within a two-block radius of the site of an elderly housing project were granted priority and successive priorities were given to persons living within concentric half-mile circles. The "proximity rule" helped "very obviously" to obtain an Alderman's approval because it was a "fair assumption" that a White site would be occupied by Whites. CHA abandoned the "proximity rule" after the Commissioner of Public Housing Administration informed CHA that enforcement of the "proximity rule" would result in loss of federal funds. Letter of December 11, 1963. Before abandonment of the "proximity rule" the selection of elderly housing sites in White areas was consistent with a policy against placing Negroes in White neighborhoods, and after its abandonment a change to a policy of selecting all Negro sites would almost certainly have resulted in a loss of federal funds. Therefore, the circumstances surrounding the choice of sites for elderly housing tend to prove a purpose to perpetuate racial separation rather than to refute it. The mix of White and Negro elderly housing sites is not relevant except to show (as does the nearly identical mix between White and Negro family sites initially selected by CHA) what would probably have happened in the absence of a policy of eliminating White sites on racial grounds.

No criterion, other than race, can plausibly explain the veto of over 99½% of the housing units located on the White sites which were initially selected on the basis of CHA's expert judgment and at the same time the rejection of only 10% or so of the units on Negro sites.

B. Testimony on Site Selection Criteria

High CHA officials clearly understood the message of the statistics, and with commendable frankness some of them said so. While Executive Director, Mr. Rose testified in 1959 before the U. S. Commission on Civil Rights:

"Q. Because of the present location of the existing sites, then, the Council of Chicago is guilty of practicing to a certain degree segregated housing, is that true?

"A. You are only agreeing with me.

"Q. Well, somebody is guilty of contributing to the segregation of housing of people in the City of Chicago, because when you look at the present location of the housing projects, they are predominantly within the Negro area.

"A. That is true."

Rose Dep., p. 9.

On July 16, 1966, Mr. Humphrey, who was then Deputy Executive Director, responded to a question from an Alderman in testimony before the City Council:

"Q. And did he then ask you why the Housing Authority hadn't presented any sites outside the segregated Negro neighborhoods?

"A. I think he asked that question, yes.

"Q. And did you answer that the reason was you couldn't find any suitable sites outside the Negro neighborhoods?

"A. I didn't answer it that way at all.

"Q. What answer did you give?

"A. I answered it to the effect that he knew as well as I as to why we didn't have other sites; that he knew that if the site was approved by the alderman that it was included in the package and if it wasn't approved it wasn't included, and I added to that, incidentally, there are none in the package from your ward."

Humphrey Dep., p. 133.

Mrs. Kathryn Moore, General Counsel of CHA, stated that in her opinion land in White areas equally suitable for development and often cheaper than land in Negro areas was unavailable solely because of the requirement of City Council approval. Moore Dep., p. 18 and Ex. 5.

CHA follows an unvarying policy "based upon actual experience in submitting sites to the City Council for approval" of informally clearing each site with the Alderman in whose Ward the site is located and eliminating each site opposed by an Alderman. Humphrey Aff't., p. 7. Humphrey Dep. I, p. 100. Rose Dep., p. 59. (There is some confusion whether the White sites eliminated from the 1955, 1956 and 1958 programs were formally submitted to the City Council or informally vetoed. Cf. Humphrey Aff't., pp. 4-6. with Humphrey Dep. I, pp. 98-100.) The statements of Mr. Humphrey and Mr. Rose quoted above indicate that they personally knew that this procedure would result in the veto on racial grounds of substantial numbers of White sites. Mr. Humphrey also stated on deposition:

"Q. Was the reason actually that you knew the City Council would probably not approve public housing sites in white neighborhoods?

"A. I said no doubt, there.

"Q. You mean that was no doubt the case?

"A. Well, I am assuming from what had been going on the last few years that you just couldn't go anywhere in the City of Chicago that you wanted to and acquire a site.

"Q. Particularly in the white neighborhoods, I take it?

"A. Right."

Humphrey Dep. II, p. 204.

An uncontradicted affidavit claims that Mr. Charles Swibel, Chairman of the Board of Commissioners of CHA, stated in private conversations on numerous occasions that the City Council had CHA "over a barrel" and consequently CHA acquiesced in choosing sites in Negro neighborhoods. Berry Aff't. Since CHA directly denies none of these statements or numerous other statements to a similar effect cited in Plaintiff's briefs, there is no genuine issue as to the truth of the fact that the pre-clearance procedure was known by CHA to result in the veto of substantial numbers of sites on racial grounds.

C. Legal Consequences of the Site Selection Policies.

On March 2, 1967 this court ruled that "plaintiffs, as present and future users of the system, have the right under the Fourteenth Amendment to have sites selected for public housing projects without regard to the racial composition of either the surrounding neighborhood or the projects themselves." 265 F. Supp. 582, 583. The statistics on the family housing sites considered during the five major programs show a very high probability, a near certainty, that many sites were vetoed on the basis of the racial composition of the site's neighborhood. In the face of these figures, CHA's failure to present a substantial or even a speculative indication that racial criteria were not used entitles plaintiffs to judgment as a matter of law. Jones v. Georgia, 389 U. S. 24 (1967) (finding of discrimination based entirely on jury selection statistics and absence of explanation); Hernandez v. Texas, 347 U. S. 475 (1954) (same). The additional evidence of intent, composed mostly of uncontradicted admissions by CHA officials, also establishes plaintiff's right to judgment as a matter of law either considered alone or in combination with the statistics. Cypress v. Newport News General and Nonsectarian Assn., 375 F. 2d 648 (4th Cir. 1967).

Defendants urge that CHA officials never entertained racist attitudes and that "the racial character of the neighborhood has never been a factor in CHA's selection of a suitable site." Humphrey Aff't., p. 2. In view of CHA's persistent selection of White sites at the initial stage before the pre-clearance procedure and the candor of its officials on deposition, these statements are undoubtedly true. It is also undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other landable goals are pursued. Brown v. Board of Education, 347 U. S. 483 (1954). It is also true that there is no evidence that the Aldermen who vetoed White sites were necessarily motivated by racial animus when they followed a policy of keeping Negroes out of White neighborhoods.

Most Aldermen apparently talked to their constituents and received unfavorable reactions before exercising their informal vetoes. Humphrey Dep. I. pp. 116-117; Rose Dep., p. 59. But even if the Aldermen's informal surveys were correct in their uniform assessment of public opinion, they cannot acquiesce in the sentiment of their constituents to keep their neighborhoods White and to deny admission to Negroes via the placement of public housing. U. S. v. School District 151, -- F. 2d -- Docket No. 17022 (7th Cir. Dec. 17, 1968), at p. 11 of the slip sheet opinion; cf. Reitman v. Mulkey, 367 U. S. 369 (1967).

CHA finally contends that the impulse originating and sustaining the policy against choosing White sites came from the City Council. But by incorporating as an automatic step in its site selection procedure a practice which resulted in a racial veto before it performed its statutory function of formally presenting the sites to the City Council, CHA made those policies its own and deprived opponents of those policies of the opportunity for public debate. It is no defense that the City Council's power to approve sites may as a matter of practical politics have compelled CHA to adopt the pre-clearance procedure which was known by CHA to incorporate a racial veto. In fact, even if CHA had not participated in the elimination of White sites, its officials were bound by the Constitution not to exercise CHA's discretion to decide to build upon sites which were chosen by some other agency on the basis of race. Cooper v. Aaron, 358 U. S. 1 (1958); Orleans Parish School Board v. Bush, 268 F. 2d 78 (5th Cir. 1959). See also U. S. v. School District 151, supra, in which the court observed at footnote 7, "There is no doubt that Board members were under severe pressure from District residents and that performance of duty was made difficult. But this cannot excuse the unconstitutional conduct justifiably found on this record." Although neither the City Council nor its members individually are parties to this suit, they will be bound by any order entered in this case against CHA of which they have actual notice. FRCP 65 (d).

III. RELIEF

Plaintiffs' motion for summary judgment is granted on Count I; defendants' motion is denied.

A final judgment embracing all claims for relief shall not be entered for 30 days. During that time the parties should attempt to formulate a comprehensive plan to prohibit the future use and to remedy the past effects of CHA's unconstitutional site selection and tenant assignment procedures. If the parties cannot agree, each party shall submit a proposed judgment order.

Summary judgment is denied as to both parties on Count II. Although this court held on March 2, 1967 that Count II states a claim upon which relief can be granted under 42 U. S. C. Sec.

2000d (Section 601 of Title VI of the Civil Rights Act of 1964), judgment on Count II would, in the context of this case, determine the propriety of granting a narrow, drastic kind of relief--that of enjoining the use of federal funds. The Public Housing Administration has already taken a position against denying federal funds in reply to a rather scanty presentation protesting the selection of a few sites on the basis of racial composition of their neighborhoods. Letter of October 14, 1965 from Marie C. McGuire, Commissioner of PHA, to Rev. Jerome Hall of the West Side Federation, Swibel Dep., Ex. 3. In addition to the uncertainty of whether PHA would hold it appropriate to deny funds under the facts as they are now known, it is not clear whether even a temporary denial of federal funds would not impede the development of public housing and thus damage the very persons this suit was brought to protect. The use of a threatened denial of funds to coerce compliance with the Constitution, if coercion is necessary, would seem to be a less efficient remedy than an injunction available under Count I. Therefore, summary judgment is denied without precluding plaintiffs from showing on the basis of more facts that denial of federal funds is an appropriate form of relief.

Two further results of CHA's participation in a policy of maintaining existing patterns of residential separation of races must be mentioned. First, as Dr. Baron's Affidavit discloses, the 188,000 White families eligible for public housing have understandably chosen in the main to forego their opportunity to obtain low cost housing rather than to move into all Negro projects in all Negro neighborhoods. This is an ironic but predictable result of a segregationist policy of protecting Whites from less than half as many (76,000) eligible Negro families. Second, existing patterns of racial separation must be reversed if there is to be a chance of averting the desperately intensifying division of Whites and Negroes in Chicago. On the basis of present trends of Negro residential concentration and of Negro migration into and White migration out of the central city, the President's Commission on Civil Disorders estimates that Chicago will become 50% Negro by 1984. By 1984 it may be too late to heal racial divisions.

V. THE LEGAL PROCESS AND THE URBAN CONSUMER

A. Introduction:

Most low-income consumers in the throws of struggle with their creditors view the legal process merely as an instrument with which any creditor, no matter the right or wrongfulness of his position, can beat them. As consumer credit has become an all prevailing way of life for the low-income urban citizen, that view has not been far from correct. While the life style which forces the low-income shopper into deep debt for frequently poor quality goods is caused by a myriad of factors, the reason for the failure of the legal process to work for these consumers in their desperate situation is reasonably easy to pinpoint. First, the law has traditionally looked at both parties who sign a contract as equals. The old cases clearly say that only a minor or mentally deficient person would sign his name to a piece of paper before he understood everything that was expected of him~~, and~~ everything that was due him under the terms of the paper. For those two categories, a contract has always been unenforceable. However, in general, the law has usually been unable to believe that a grown man or woman who complains after signing a contract that he didn't understand is not merely trying to avoid an obligation, which he freely contracted, to the detriment of the other party. The second problem is that the system is based on the assumption that both parties to a civil dispute have equal access to counsel.

It is clear that neither of these assumptions may be properly applied to the low-income consumer. The low-income consumer is frequently not in any way equal to the task of dealing with an easy credit retail selling situation in a way that can protect his interests. In the urban situation, the consumer is frequently illiterate, sometimes has difficulty with English and almost always has no "shopping around" power in a realistic way. Any attorney who has had any experience in defending consumers on credit sales contracts can testify that even if none of the above were true, the contract which must be signed would still be almost impossible to understand either because of the size of the type or because of the purposely convoluted and confusing language. In the life experience of the low-income consumer, if he wants the goods, there is only one way to get them; that is to sign the contract even if he knows what it means. Too many consumers rely on the promises of the salesmen as to the meaning of the contract and make no effort to check it on their own behalf. However, until recently, that was a manner of behavior for which the law made them bear full responsibility.

The problem, from the theoretical point of view, has been how to give the party that wants to uphold the contract, in these cases the seller, some way of showing that the other party did indeed enter into the contract purposely, if you take away the fact that the buyer signed his name to the contract as proof.

The second leg upon which our contractual system is based is that both parties have equal access to the courts if they feel some harm as a result of the contract. This is also a false premise as to the low-income consumer. In the first place, it rests upon the assumption that both parties know what their rights are. As the following articles show, the low-income consumer frequently believes that he has no rights at all in consumer matters. Secondly, even if he believes that he may have some way to defend himself in the courts, or wants to explore that possibility or perhaps to be the plaintiff in a case, he has had very few places that he could go. Legal service clinics are just now beginning to be moderately available. Private lawyers do not handle cases without fees for the most part, and if the consumer had enough money to pay a private lawyer, then he might have had enough money to have avoided "easy credit" problems in the first place.

The factors which have made the situation most brutal for low-income consumers is that merchants have relied on the fact that the assumptions of the law are indeed incorrect as applied to their customers. Ghetto merchants and peddlers know full well that the customer usually has no ideal of the sort of agreement into which he is entering and almost never knows enough to go to a lawyer or can find one to take his case. So, the merchant uses the threat of the law and the form of the system to take full advantage of the consumers' disability.

But the law has begun to catch up with life. The inauguration of the war on poverty has had one important effect: the creation of numerous aggressive legal services offices all over the country (though there are still not enough) and the growing awareness of the actual life experience of the consumer as far different from anything portrayed in the legal system before.

The following articles illustrate the problems of the low-income consumers as well as some recent development in remedies:

B. The People and the Issue.

It is important to understand exactly who the parties in the consumer credit situation are. First is the consumer, the buyer. He may be either defendant or the plaintiff. If he is defending it is probably because he has defaulted on his payments for some reason. If he is bringing the suit it is frequently because of the failure of the seller to provide the type or quality of goods or services promised in the contract.

The other party is usually either the seller or a bank or finance company. The fact that the other party is not always the merchant from whom the goods were purchased and with whom the contract signed is an important point to note because of its immense legal significance. Frequently, a finance company or bank which "buys" the contract between the store and the buyer has the right to expect payments from the buyer regardless of whether the goods being paid for fulfilled the requirements of the contract. In other words, a consumer whose financing agreement is in the hands of the finance company or bank may not use any of the defenses against payment which might be good against the seller to protect him from having to pay the finance company. An illustration of a typical transaction will show how the arrangement works.

Claude Consumer sees an advertisement for a color t.v. set on sale at a neighborhood store for $399. He goes into the store and is told that he can have a new combination color t.v. stero set for only $10 a month. After hearing the salesman talk about what a terrific buy this set is, he signs a paper that the salesman tells him is the credit arrangement. Two days later the set is delivered and five days later it breaks down. The salesman had also told him that there was a 90-day complete warranty, so Claude calls the store. They tell him that they went out of the t.v. business. Claude tells them to come pick up the set. They don't come and Claude starts getting letters from the E.Z. C redit Finance Company requesting his $10 per month payments. He has never heard of the finance company. After six months he calls the finance company and tells them that the set didn't live up to the promises of the contract and so he won't pay for it. However, that is not a good defense against the finance company. Claude's contract was sold to the E. Z. Credit Finance Company by the merchant the day that they sold Claude the t.v. set. The Finance Company, knowing nothing about the deal between Claude and the seller, has the right to have payment from Claude regardless of the seller's behavior in the deal.

Historically, the reason for enforcing the financing agencies right to payment was simply to encourage the underwriting of credit for business purposes. If banks and finance companies were responsible for the behavior of the people from whom they bought the contracts, it was thought that they would simply go out of business of financing these sort of credit arrangements and this would be harmful to that part of our business economy which relied on credit. It was unreasonable, it was thought, to expect banks and finance companies to supervise the behavior of sellers. Besides, if consumers were not willing to take the risk of non-performance of the original seller, they didn't have to sign a credit contract which was a negotiable instrument. In addition, it was thought that the consumer still retained his rights against the original seller and that was how he should go about getting his redress, not by defaulting on his payments to the financing agency, but by suing his buyer for breach of contract. Subsequent articles will show how that thinking breaks down when applied to non-business consumers in general and to low-income consumers in particular.

In consumer problems, we are talking about three parties and two transactions. The three parties are the consumer, the merchant and the finance agency. The first transaction is when the consumer buys on credit from the merchant and the second transaction is when the merchant sells the credit contract to a finance company for cash.

The common use of credit by ill-educated consumers with little or no buying experience, and little recourse to legal help sets the scene for the story of consumer exploitation and its resolution.

"The Slum Dweller" by Patricia M. Wald
Law and Poverty: 1965*

The slum dwelling with the television antenna on the roof, the new sewing machine in the front bedroom, and the convertible out front is a stereotype of the "irresponsible poor." Like most stereotypes, it has a truthful aspect. A 1960 survey of 500 tenants in a low-income housing project--15 percent on welfare --disclosed 95 percent owned a television set, 63 percent a phonograph, 42 percent a sewing machine, 40 percent an automatic washer, 28 percent a vacuum cleaner, mostly of recent origin. Seventy-three percent had bought new furniture when they moved in. Eighty percent had bought on credit. Two thirds still owed money on their purchases, and one out of every five families had been the subject of legal threats, repossession, garnishment, or the threat of garnishment.

There is more behind this pattern than ignorance or irresponsibility, or even "compensatory consumption"--the desire of the poor for tangible status symbols to compensate for blocked social mobility. Merchants in poor neighborhoods use high-pressure methods to sell costly durables to poor credit risks.

Typically, these people purchase close to home; they are too intimidated to venture into the impersonal efficiency of the downtown department store or discount house. Neighborhood stores, or door-to-door salesmen, offer the poor consumer easy camaraderie, easy credit and high prices.

Markups on goods are extremely high, usually over 100 percent. Prices fluctuate widely in the same store according to the sales resistance and sophistication of the consumer, but overall remain high enough to compensate for missed payments. Merchandise is apt to be low quality because of insulation from the competition of stores beyond the immediate neighborhood. Goods are aggressively sold to customers with no credit ratings, on welfare, without jobs.

The collections necessary to stay in business are achieved by a variety of coercive devices. Garnishment threats are effective. What is at stake often is the purchaser's job. Employers, particularly in low-skilled, high-turnover employment, are loathe to bother with wage attachments; firing is easier. Creditors threaten to report purchasers to the welfare authorities; relief recipients are not supposed to buy on credit. The original sales contract is often sold to a finance company of collection agent against whom the buyer can raise no equitable defenses.

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In this "captive" market, unethical practices flourish: "bait advertising," "switch sales," reconditioned goods sold as new, tie-in "contest" prizes. Exchanges are virtually unknown; the buyer is "stuck" with his bad bargain.

The poor must eat, hence, are vulnerable to exploitation on food purchases, as well. Their scanty cash is channeled in large part into groceries. Food is seldom brought on the installment plan so payments cannot be withheld. One reporter's survey of the operations of a grocery chain in Washington, D.C. found that in small stores of the chain, located in run-down sections of the city, whether white or Negro, the quality of perishable items was lower; fresh fruits and vegetables were wilted and bruished; the least expensive brands of packaged staples were likely to be missing; in many instances, prices for the same goods were higher than in better neighborhoods; rancid hamburger was 10 cents a pound more than fresh hamburger uptown. Poor customers were generally reluctant to stand up to the store managers, even though they recognized and resented their exploitation.

Even without consicous exploitation, a complex of factors --the paucity of supermarkets and discount houses, inability to pay cash or to buy in economical quantities, lack of shopper sophistication-interact to make the poor pay more. Nor are they ordinarily eligible for bank loans or installment contracts at regular department store rates to finance their purchases. Hence, they are forced into higher-interest sources of credit, "loan sharks" or landing agencies that charge in proportion to the risk.

When the purchaser misses a payment for illness or any other emergency, he falls prey to the "debtor spiral"--a deficiency judgment for the principal plus interest, court cost and legal fees, which can easily double a debt. Judgments here, as in landlord tenant cases, are often secured by "sewer service." In other cases, the debtor cannot afford the time to defend his rights.

> My wife and I bought some furniture and for the first few months we paid the store. Then the store sold out to another one and we had to pay the second store. They told us they had no record of the money we had already paid and said they would take us to court if

> we didn't pay them $150 more. I'd rather pay the money than to go court and take time off from work because I just got my job and I don't want to lose it.

The result of a default judgment may be repossession and sheriffs' sales which may include other possessions of the debtor.

These transactions plunge the debtor deeper into poverty. He loses his job because of attachments. He is evicted from his home because of rent delinquency resulting from consumer debts. The strain of consumer debt may send the marginal family out on relief or break it up altogether.

The solution to the commercial exploitation of the poor does not lie in legislation alone. The slum dweller who buys unwisely can hardly be expected to know his liabilities or his rights of recourse against his seller, even if firmly established under law. He does not understand that he must pay for goods even though repossessed, that unrelated possessions can be attached for nonpayment of the purchased goods, or that additions for court costs, marshals' fees, and interest can multiply the original debt.

Often he mistakenly believes his legal remedy against a fraudulent seller is to stop paying. On a more basic level, he seldom has the time, money, or knowledge to institute action against his seller, especially in a distant downtown court.

The magnitude of consumer finance problems is indicated by the rapid growth and the present large size of consumer installment indebtedness in the United States. At the end of World War I the total outstanding consumer installment credit was $1,000,000,000 and at the end of 1963, this figure was $53,745,000,000. There are two types of consumer credit--lender credit and vendor credit. The layman is not prepared to differentiate between these two types of consumer credit. His common sense approach is to consider lender credit and vendor credit as two alternative ways of acquiring goods for which he does not have enough ready money to purchase, but he doesn't think of these alternatives as being qualitatively different. Yet, in the eyes of the law the differences between lender credit and vendor credit are fundamental.

*From Wald, Law and Poverty 1965 (working paper for the National Conference on Law and Poverty, Wash., D. C., June 23-25, 1965) pp. 22-28.

Comment: Interest Rates

Perhaps the most critical difference between lender and vendor credit, is that lender credit, that extended by banks and financing institutions, is regulated as to the amount of interest charged. Vendor credit is not considered the lending of money and does not fall under usury statutes.

Many people erroneously assume that the usury statutes of each state place a ceiling upon the interest rates that can be charged in any type of transaction. In most states, limitations on interest rates set out in the statutes deal only with the lending of money and do not apply to consumer credit. In theory, the seller is not turning over money to the buyer, but instead is selling goods, and interest rate ceilings do not apply. The amount of money which the consumer pays for the privilege of paying for his goods in installment payments is called the time payment differential, carrying charge or finance charge. (However, see comment supra on the Truth-in-Lending Act.)

"GHETTO FRAUD ON THE INSTALLMENT PLAN"*

By Craig Karpel

Warren, a grown man who lives with his mother, walked into the Harlem Consumer Education Council's basement office a few months ago. Director Florence Rice gave him a leaky ball-point pen and he wrote:

"Bought TV from door to door salesman--Philco 19" lot of trouble with TV back cracked notify company to come have fix. Company claimed misplace TV sent repossed TV 1949 had to stick in hanger to get reception--two weeks after that broke down. Called to fix that removed TV still pay bill by garnishment--left job on account of garnishment which effect my marital relation as the garnishee took away from our expenditures food clothing and rent. Which for which my wife was forced to except welfare and I left to establish myself again TV paid $500 never received TV."

Louis-Ferdinand Celine coined the conceit that life was nothing but death on the installment plan. For poor people in New York City, this comes close to being literally true.

Six years ago sociologist David Caplovitz of Columbia's Bureau of Applied Social Research published a book called "The Poor Pay More." The book is a landmark in the literature of consumer problems right out there with "The Jungle" and "Unsafe At Any Speed." As a result, Caplovitz had become witness-in-residence at a host of committees and subcommittees where he talks about the lack of "Scope" which keeps poor people from leaving their neighborhoods in search of better prices and terms, about the "deviant sub-economy" which springs up like weeds through the cracks in the cement of tenement courtyards, where nothing flourishes that isn't rank.

The Great White Way of the deviant sub-economy is the L-shaped strip of 54 furniture and appliance stores running from 116th Street and Third Avenue to 125th street and Lexington. The strip is the home of literal (junk). Not figurative (junk), as in "that agency has nothing but (junk) accounts." Literal (junk): doll furniture one good long cut below "borax." "Borax" is junk, but it's better-quality junk. Birch? maple? dowels? glue? fabrics? Veneers? Forgot it--(junk) is made of gumwood and flakeboard, knocked together with a few screws, upholstered in plastic "brocade" and varnished like a cheap coffin. The prices, however, are strictly W. & J. Sloane. (Junk) stores do not talk about percentages of markup, like 50 percent markup or 75 percent markup--they talk about how many "numbers" they jack the price up over wholesale, and a "number" is 100 percent. All (junk) is marked up at least one number, and on a credit sale the markup can be three or four numbers.

*Reprinted from New York Magazine by permission of author and publisher.

So why buy (junk)? Because the (junk) emporia will give terms: "Easy credit." "Easy credit" means that as long as you are working and have wages that can be attached in the likely event that you miss one payment, you're okay. "Easy credit" means that if, as Shyleur Barrack, head of the Harlem civil branch of the Legal Aid Society once did, you go into a store and give a reference who says you now have two garnishees against your salary, the salesman will come back from the phone smiling and try to hustle you into $1,114.80 worth of furniture and appliances. "Easy credit" means that there is a store on 125th Street called Future Furniture that has to have a sign in its window: "We Accept Cash."

But all the places on the strip offer "easy credit," and a store can't generate much traffic by telling poor people it's going to take them to the cleaners, so it runs an ad in the Daily News in which two credit managers (black and white, take your pick) offer

> Economy Apartment $198
> Sleeper, matching chair, 2 walnut finish
> step-tables plus decor, lamps, walnut finish
> bachelor chest, matching mirror, full size
> bed, with 1 pc. Firestone comb. mattress, 16
> pcs. dishware, 16 pcs. cutlery, 8 towels, 11 pc.
> salad set, 29 table access.

But once they've spent the money to get you into the store, they can't let you out with only a miserable $198 worth of (junk). That is only the bait end of bait-and-switch advertising. By the time the customer leaves, he should have put his Juan Hancock on the dotted line for at least $1,000. To cause this takes more than just an old-fashioned bait-and-switch. It requires nothing less than that balletic extravaganza of salesmanship known to the trade as the "turnover" or "tossover," code name "T. O." The salesman starts by showing the customer a pile of junk for $198. One store keeps its bait furniture piled in a dark corner, lit by a naked lightbulb. It is painted battleship gray, every stick of it, down to what used to be the chrome legs on the dinette table. If you wanted to give a salesman a heart attack, all you'd have to do is say, "Okay, I'll take it." "You don't want this stuff," he says. "It'll fall apart in a couple of months. Besides, a person like you can afford something a little bit better." The salesman then takes the stiff upstairs in an elevator, but not before shaking him down for a $50 deposit for the privilege of "seeing the warehouse." The elevator gets "stuck" after the first trip up and doesn't get unstuck until the stiff has been signed up for a bill of goods. The idea of the T. O. is to show the stiff successively more expensive suites of furniture without letting him get discouraged about the price.

When he begins to look green around the gills the first time around, the salesman turns him over to another salesman who is introduced as the "assistant manager." The A. M. immediately "sandbags"--knocks 50 percent off--whatever the first salesman quoted. The stiff is so taken aback that he lets the A. M. build him up again. Just before he begins to feel weak again, the A. M. turns him over to the "manager," who slashes the A. M.'s prices "as a special favor for you." The manager will try to build him up to, say, "800 or $1,000." If the stiff says he "wants to think about it" and tries to leave, he finds that the elevator is on the fritz. The "owner" now appears, knocks off a hundred bucks or two, and this usually convinces the stiff to sign. At which point the elevator suddenly clicks into action.

Now the fraud starts in earnest. When the furniture arrives, it's almost invariably damaged--delivery men routinely saw off legs on couches to get them in elevators and fit them back together with a special doubled-ended screw. The furniture turns out to be a junkier variety of (junk) than what was ordered. The colors bear no relation to what was displayed in the "warehouse." The stereo doesn't work. The television looks used. Two chairs are missing. You were supposed to get a 9 x 12 rug with your order; the "rug" turns out to be a piece of linoleum. When the payment book arrives, the installments listed add up to much more than the amount that was agreed on.

Try to do something about it.

Say, for example, that the glass coffee table is cracked. You bring it back and the salesman tells you he'll be happy to give you your money back. He shows you that the contract simply says "three rooms furniture" for $943.17. It doesn't list the price of the table separately, and now he tells you the price was a dollar. "Would you like your dollar back?" he asks slyly. Or tell him the dinette table keeps collapsing and he says he'll send a man up, but nobody comes. Or say you want to send everything back because it isn't anything like what you ordered. If you're lucky the salesman agrees and the store picks up your furniture, but when you go back to pick up your $50 deposit, he says the store is keeping it as a "service charge." And you let him bulldoze you because you don't know what else to do.

Some stores rise to printworthy extremes of doublethink when it comes to not returning deposits. Dorothy Mason, a counselor with the MEND consumer education project in East Harlem, tells about a guy who came to her recently because he couldn't get his deposit back.

"He had put down $150 at Eldorado Furniture and Appliances on Third Avenue. A salesman had convinced him to buy a washing machine and a 19-inch portable television for only $649. Two things happened to bring him to my office. First, the washing machine wad delivered with a broken timer. He could not get any satisfaction from the store. Second, he found out that he could buy the same washer for $199 instead of the $299 he had paid."

"I went over to Eldorado with this man to discuss the matter with Samuelson, the boss. Samuelson said, 'Your man could have had it for $199 cash.' 'Then why did you ask $299?' I asked him. 'Because the man is a bad risk,' he said. 'How bad a risk could he be,' I asked, 'if you've got 140 of his dollars?' Well, I thought of him charging this man on welfare $649 for merchandise on credit that he could have purchased for $360 with cash, and I smiled, because this was almost a daily experience on Third Avenue with complaints of poor consumers. Samuelson became very upset and threw me out for smiling."

"You wouldn't believe some of these places," says Steve Press, whose New York Institute for Consumer Education is setting up a cooperative furniture store in East Harlem. "They'll stamp NO DEPOSIT RETURNED on the contract. That would never stand up in court, but poor people are impressed and don't even bother asking for their money back."

There is a certain type of used-car dealer in New York that is especially anxious to deal with poor people. Tune in to WWRL:

"Friends, have you tried to buy a car lately? Have you been turned down? Well, call Headquarters at 538-4300 ... You have a garnishee or a judgment against you, and no one will let you forget them? Well, call Headquarters at 538-4300 ... Your desire to pay plus a small down payment is all you need."

"Used car dealers really do a job on poor people," says former Commissioner of Consumer Affairs Gerard M. Weisberg, recently appointed a Criminal Court judge. "Some of those lots out on Bruckner Boulevard and Queens Boulevard--they don't deliver the car that was agreed on, they inflate prices to a point you wouldn't believe, they charge a fortune for so-called 'credit investigations.' And they refuse to refund deposits if the customer's credit doesn't check out, though they lure him out there with promises that nobody's refused. Recently we revoked the license of Motorama Wholesalers on Queens Boulevard. Motorama was taking people's money and refusing to deliver the cars. The deposits ranged up to $580.

"The Department is constantly going over these dealers' books, but it's tough to police them. You put one corporation out of business, the next thing you know there's another corporation employing the same salesmen, using the same shady tactics on the same lot."

The Consumer Fraud Unit set up by US Attorney Robert Morgenthau under the direction of Richard A. Givens has been looking into the used-car racket.

"Our investigations have disclosed a pattern of sales of certain used cars at many times their original cost," explains Givens "followed by a cycle of repossession, repurchase of the car at a low price at auction and further resale at many times that price to new customers, who in turn are frequently sued by finance agencies and often claim to have received no notice of suit. The inquiry indicated that in certain cases some used-car dealers know in advance that there will be a complaint regarding each and every automobile sold and that many customers will give up the car and default because they feel it can't be made to work. We're looking into possible violations of federal law by these people."

You don't have to leave the comfort of your home to be bilked. Peddlers making the rounds of slums and projects run the oldest-established permanent floating crap game in town. Encyclopedia salesmen tell welfare mothers they are officials of the Board of Education, that the books they are pushing are required reading for their children. They sell people encyclopedias who already have encyclopedias. They sell $379.60 worth of books in English to people who only speak Spanish, to people who can't read at all, to people who are destitute. A peddler tells a woman she can have a set of pots and pans in her home for 10 days; if she doesn't like them, she can return them. When the utensils arrive, she signs a receipt for them. She decides to call the company and tell them to take the stuff back because it's junk. Then she realizes she has no idea what the company's name is or where it's located. The "receipt" she signed was actually a retail installment contract for $83.75. Soon she gets a payment book in the mail with a note saying she'll be sued if she misses one payment.

Richard A. Givens prosecuted a character named Rubin Sterngass recently for running a "chair referral" swindle, a mode of fleecing that is popular in the slums. A salesman would come to the house and offer quartz broilers and color television sets for nothing if the customer would refer acquaintances to Sterngass' company. The customer would sign up for a color TV at a credit price of $1,400; commissions were supposed to be paid to him for each "successful" referral--$50 for the first, $200 for the fourth, $400 for the eighth and $1,200 on the twelfth. Givens demonstrated the scheme had its faults by presenting a table of how many new customers would be necessary at each step if the merchandise were to be paid off by referral commissions:

Step	New Customers Necessary
1	8
2	64

Step	New Customers Necessary
3	512
4	4096
5	32,768
6	264,144
7	2,113,152
8	16,905,216
9	135,241,728
10	1,071,933,824

Givens argued successfully that since every last human being on earth, plus everybody who had ever lived, plus a few generations yet unborn, would have to buy quartz broilers and color TVs on the eleventh go-around for the scheme to work. Sterngass ought to go to jail and think about other ways of doing business for a few years. The judge agreed.

At any given moment there is one super-fraud that sets the tone for all the other ghetto frauds in the city. Until last year the super-fraud was the "family food plan." Ray Narral, head of a legal services office of mobilization for Youth, describes how the plan worked.

"Mr. and Mrs. Hernandez have two infant children and live in a New York City housing project. A salesman knocked on their door and said he was offering a very good food and freezer program. 'If you join,' he told them, 'you will be able to save a great deal of money feeding your children.' All of the sales literature indicated that for $12.50 a week, the family would receive a complete order of food--prime meats, fresh vegetables, everything. The freezer, the salesman announced, was theirs to store the food in, completely free of charge. The sales pitch was so inviting that the couple signed up immediately. They later discovered that the papers they signed were a retail installment contract for the food in the amount of $375.00 and a contract for a freezer for $1,020.76. Payments on the food were $93.75 a month for four months and 35 installments of $28.35 for the freezer."

Two years ago, a Nassau County District Court was asked to void one of these freezer contracts. It handed down a decision that, under the "unconscionability" provisions of the Uniform Commercial Code, "the sale of the appliance at the price and terms indicated in this contract is shocking to the conscience." Attorney General Lefkowitz Bureau of Consumer Frauds and Protection went to court against the "family food plan" operators, seeking orders restraining Serve Best Food Plan, Thrift Pak, and People's Food from "carrying on...their business in a persistently fraudulent manner." In 1968, the Bureau curbed the biggest food plan operator of all, Martin Schwartz of Ozone Park, whose five companies were raking in a very neat $10 million a year.

The current super-fraud is a "sweepstakes" craze that started somewhere in the Southwest and recently arrived in New York. It offers sewing machines and stereos "free" to holders of "winning numbers." Regardless of where in the U. S. the shuck is being operated, the "contest" materials are the same. A chain with seven stores in New York is now being investigated by the city's Department of Consumer Affairs. The swindle starts with this letter:

> HERE IS YOUR OPPORTUNITY TO
> PARTICIPATE IN OUR "STEREO SWEEPSTAKES"
>
> It's fun! It's easy! Just remove the gold seal to find your serial number, and compare it with the enclosed list of lucky numbers.
>
> If you have a lucky number, it means extra savings to you!
>
> For example! If you have a number which appears in Group 3 (Grand Prize) you pay nothing for a beautiful 1969 General Electric Stereo Console.

The number under the seal on this letter is 67487. 67487 is listed on the enclosed list of lucky numbers, not once, but twice, so you won't miss it and be the only person who receives such a letter who doesn't "win." A Consumer Affairs investigator visited one of the stores with this letter. He was shown a G. E. stereo model C121. The salesman explained that the investigator had won this record player, worth $150, but that it couldn't be removed unless he signed an installment contract to buy a record a week for 39 weeks at $5 each. The investigator called the Dealer Equipment Section of G. E. and found that the C121 carries a list price of $99.95. The records which must be purchased under the plan are displayed around the store. They are the sort of off-brand, off-band cha-cha albums that one ordinarily finds remaindered for $1.19.

There is cash-and-carry cheating in poor neighborhoods, but most ghetto fraud hinges on the "easy credit" retail installment contract. It invariably has some features designed to protect the consumer, which seldom work, and others designed to nail him, which always work. Under the law there has to be a "Notice to Buyer." The first point must say: "Do not sign this agreement before you read it or if it contains any blank space." In fact, nobody ever reads one of these agreements. They ordinarily run to about 2,300 words in phrases like "time is of the essence hereof." (The Everything Card chit is a retail installment contract--ever read it?) The space for a description of the merchandise is hardly ever filled in completely at the time of the sale--usually only a few words are written in at the top, like "3 Rooms Furniture" or "one 23" Color

TV." What harm in that? Just a second--point number two is: "You are entitled to a completely filled in copy of this agreement," and right above where you sign, it says: "Buyer acknowledges receipt of an executed copy of this Retail Installment Contract." But the moment your pen leaves the paper the salesman whips the contract away--including your copy--and the next time you see it, if you ever do, it says "Damaged Furniture--Accepted as is" or "used Television Set--Customer Will Repair" right in the blank space you were warned against. This is all assuming you read the "Notice to Buyer," of course. One reason you might not have read it is that you only read Spanish. The stores have "muebleria" and "credito" and "se habla espanol" plastered all over the outside, but there is no such thing as a contract printed in Spanish. The finance company's linguists are apparently too busy composing dunning letters to the campesinos.

The fine print on the back socks it to the buyer in terms only a lawyer can savor. The kicker is contained in the following hocus-pocus: "The Buyer agrees not to assert against an assignee a claim or defense arising out of the sale under this contract provided that the assignee acquires this contract in good faith and for value and has no written notice of the facts giving rise to the claim or defense within 10 days after such assignee mails to the Buyer at his address shown above notice of the assignment of this contract." What this means in practice is described by Philip G. Schrag, attorney in charge of consumer litigation for the NAACP Legal Defense Fund.

"If Greedy Merchant gets Ernest Black to sign such a contract for a 'new color television' and the set turns out to be an old, battered black-and-white instrument, or even if Merchant never delivers any set at all, Merchant can sell Black's contract to Ghetto Finance, Inc., for a lump sum, and Black is out of luck. Ghetto has a right to payment in full from Black, and Black has no right to tell a court that he's been robbed."

The common-law justification for this is that Ghetto Finance supposedly knows nothing about Greedy Merchant's business practices, that it is a "holder in due course" of the installment paper. In practice, finance companies often work hand-in-glove with merchants to soak the poor.

Martin Schwartz five food freezer companies at 105-32 Cross Bay Boulevard, Ozone Park, were selling their paper to Food Financiers, Inc., Associated Budgeting Corp., and National Budgeting Systems, Inc.--each of 105-32 Cross Bay Boulevard, Ozone Park. Attorney General Lefkowitz' injunction forbids Schwartz' salesmen from stating that Schwartz' finance companies are "unassociated" with Schwartz' freezer companies. Still, the finance companies are "holders in due course" of the freezer companies' contracts and are continuing to collect on hundreds of thousands of dollars worth of paper they "acquired" before the injunction.

Tremont-Webster Furniture Corporation is at 412 East Tremont Avenue in the Bronx. When I visited this (junk) shop, it was locked. There was a sign on the door that said "Go Next Door." Next door, 410 East Tremont Avenue, behind a more fiduciary storefront than Tremont-Webster's, is Argent Industrial Corporation. It turns out that Argent buys Tremont-Webster's paper. No doubt it is a convenience for a holder in due course to have the store about whose affairs it knows nothing right next door. This kind of hanky-panky extends from rinky-dink outfits like Argent right up to the heavy-weights. Credit Department, Inc. ("That's right, Madam, no finance companies are involved in this transaction--you just sign a contract with the credit department...") has the distinction of suing more people in New York County Civil Court than any other finance company. Erase any image you may have of ghetto shylocks cowering behind boarded windows on burned-out, glass-littered streets. Credit Department is located in the heart of Dry Dock County at 60th Street and Third Avenue. Credit Department does not know anything about the business practices of the operations it finances. Take Associated Home Foods of 41-01 Bell Boulevard, Bayside, which used to sell freezer plans to poor people at prices equal to those which the courts have found to be unconscionable. That's none of Credit Department's business--they bought Associated's paper, are holders in due course and are suing people for not paying. Besides, Credit Department isn't buying freezer contracts any more--they know it's "garbage paper" and they don't want to get their hands dirty. Credit Department lists a few of its clients on its door--not that it knows anything about their operations, you understand--and one of them is Vigilante Protective Systems. Virgilante is in the business of selling burglar alarm systems door-to-door and is located at--you guess it--41-01 Bell Boulevard, Bayside.

Lately, the holder-in-due-course ploy has come under attack from consumer forces. Three states have outlawed it. A bill to end it, sponsored by Attorney General Lefkowitz, was killed in the legislature in 1968 but will be re-introduced this year. Witnesses at FTC hearings last November called for federal legislation to do away with the principle that allows finance companies to remain aloof from the dirty business practices of the companies whose paper they buy. The New York State Bar Association Committee on Federal Legislation is considering a report that would recommend that holder in due course be abolished. Richard Givens has a mail fraud indictment pending against a finance company and its officers for claiming that it was a holder in due course when in fact it had an interest in the sale of the merchandise.

Coburn Credit Company first made waves in the ghetto a decade ago when it began to carve out a commanding position in the market for furniture-and-appliance installment paper in the New York area. It rapidly gained a reputation among stores as the outfit that was willing to pay top dollar for "garbage" paper--trade cant for inflated installment contracts for purchases of low-grade goods by poor credit risks.

Today the company is listed on the American Stock Exchange as "Coburn Corporation of America." In addition to its $50 million New York metropolitan area sales finance operation, it now has small loan offices throughout the South, a mortgage operation in Louisiana and a division that runs revolving credit plans for department stores. Coburn has made skillful use of the holder-in-due-course principle to protect itself against possible charges that the merchants it finances engage in fraudulent or unconscionable practices. Under the law, for example, a finance company can't be held liable for fraud in the contract if the customer doesn't complain within 10 days after he receives notice that the contract has been sold. When Coburn buys a contract, it sends three sheets of paper to the customer. One is head "Certificate of Life Insurance Protection," another, "American Fidelity Fire Insurance Company Insureds Memorandum of Insurance." These two are of little importance to the consumer. The third sheet, half the size of the others, has no heading. Three-quarters of the way down the page are three sentences. The first of these is 125 words long. It contains an urgent warning that if the consumer does not act quickly, he will forfeit all his rights. The second and third are seven and ten words long respectively. They read, "Enclosed you will find your payment book. Payments are to be made as directed in this book.

Coburn has had brushes with the Bureau of Consumer Frauds, but according to Assistant Attorney General Barnett Levy, it has "cooperated" in giving money back to customers who claimed irregularities in the original contract.

I visited Coburn to discuss the sales finance business with President Irving L. Bernstein. His offices are in the Coburn Building, the largest structure in Rockville Centre, Long Island. One walks toward Bernstein's office past no end of teak, brass, marble, quarry tile, bronze, royal purple courches, van der Rohe chairs and recessed lighting.

The finance company's substantial physical presence would come as a shock to its thousands of poor customers, many of whom tend to personalize institutions they never see: "I got a contract with the Coburn Company, and Mr. Coburn won't wait no longer to get paid."

I tried to get Bernstein to talk about the holder-in-due-course provision. How, I asked, did Coburn make sure that the outfits whose paper it was buying were on the up-and-up? Bernstein told me that these were technical matters that I, who was "not an expert in finance," would have difficulty understanding. He preferred to tell what a bunch of deadbeats people were who lived in certain neighborhoods. I asked whether fraudulent and deceptive practices on the part of merchants might not make poor people less than willing to pay their debts.

"Listen," said Bernstein, "I have a social conscience about these things. I grew up in one of these neighborhoods--Brownsville. These people are not exactly truthful when they give credit information. And there are entirely too many of them who have no intention of paying. It was different in my day. My mother used to steal deposit bottles rather than miss weekly payments."

I suppose Bernstein saw me wince because he asked, "Do you have a social conscience?" He talked about a social conscience as if it was painful, like an ulcer. Bernstein said we ought to cut the interview short, since an important announcement was forthcoming from Coburn and he would be in a better position to discuss the sales finance business the following week. On the way out I picked up a copy of the Coburn house organ.

"Early in December," it explained, "Coburn initiated its annual 'Adopt Needy Families' program...five of the neediest families were selected. To each of the families chosen, Coburn employees in Rockville Centre have contributed specified sums of money to make an otherwise bleak and destitute Christmas into a happy and hopeful one." Gelusil for the social conscience.

The next day Coburn released the news that it would "discontinue its $50 million retail installment finance business." Coburn had protected its sales finance investment with a dunning staff of 250 who engaged in what are charitable referred to in "easy credit" circles as "hard collection practices;" the staff was being let go, so $5.1 million in contracts was being written off as uncollectible. But at the end of the story it turned out that "about $30 million will be allowed to run off and the borrowers asked to convert their contracts to direct personal loans." "The company will continue to carry about $20 million in installment receivables, but will buy such contracts only on the condition that they be converted to loans."

In the trade, the procedure of converting sales finance contracts into direct personal loans is called "flipping." It is done by offering to lend the customer more than enough cash to pay off his contract. The trick is that the maximum interest for sales finance is about 18 percent, while the legal rate for direct cash loans is 36 percent. The other advantage of "flipping" was best expressed by Bernstein when I spoke to him later:

"When you have an installment finance operation, you're going to be concerned with the dealers; this way, you only worry about the willingness and the ability of the individual to pay."

If holder in due course is abolished in New York, finance companies will be liable for fraud in the original contract. Even now, if there is fraud "on the fact of the contract"--if, for example, the interest rate charged is in excess of the legal rate, or the merchandise being pruchased is not described--the finance company is liable. But from now on, Coburn will be lending people cash to pay off the original contract, so it won't be liable for anything. If other sales finance companies go Coburn's route, they will have found a way of getting around policing the dealers whose contracts they buy. Unitl this writing, Coburn didn't know, for example, that at least one link in the chain of stores that the Department of Consumer Affairs is investigating displays a sticker that reads, "Coburn Authorized Dealer." Now Coburn knows, but with the new policy, it won't have to care.

So whether or not holder in due course bites the dust, the customer is supposed to keep on paying. But what if the couch falls apart in three months, and the store you bought it from has gone out of business and the bills continue to come? What if the color TV explodes and the repairman tells you it was a used set to begin with and the store won't exchange it? You just can't see mailing in that money order for $26.96 every month for the next 34 months? What happens if you just ignore the bills?

Nothing happens until one day, a year or so after you've forgotten about the whole painful affair, your boss asks you to come into his office. He looks annoyed and shows you a paper and says he's supposed to take $7 out of your paycheck each week and send it to the city marshal and it's a damned lot of paperwork and he'd just as soon fire you if it weren't illegal. Then he hands you the paper and says you'd better take care of it or he'll find some other reason to get rid of you. So you go to the address on the paper and the marshal tells you to pay him $10 every week or he'll send the paper back to your boss. You do it because you don't want to lose your job. The furniture, the television, were long since put out on the street as junk, but you have a wife and four children. The only problem is, you only make $70 a week and you've got to pay the marshal $10 out of that. The hopeless cycle of consumer abuses goes around and around.

Comment:

Many scholars of the problems of the low-income consumer have begun to revise their view of the merchant as the devil. David Caplovitz makes the following comments in the latest printing of his book, "The Poor Pay More."

A new printing of a book provides the author with the opportunity to evaluate his own work and to share whatever second thoughts he has with the reader. Needless to say, second thoughts have been prompted by greater experience with the subject matter and the wisdom of hindsight. The first of these has to do with the neighborhood credit merchant who is cast pretty much as the villian in this book. I think it is a mistake to see the credit merchant only as a nefarious exploiter of the poor. A more thorough analysis than I undertook in this book would have to examine the economic constraints that operate on these men. In some respects the local merchants charge more for the simple reason that it costs them more to operate. I am not thinking only of the fact that being small businessmen, they cannot buy in bulk the way chain stores and large department stores can. In addition, these merchants frequently have to pay more for the money they borrow and the insurance they need. The insurance companies seem to be facting a crisis concerning insurance in ghetto areas. Even at the higher rates they charge, they claim that they are not finding it profitable to extend insurance to ghetto merchants. There is a need for new institutional arrangements to meet the needs of the local merchant as well as those of the local consumer. Why, for example, cannot there be some system of pooling insurance and sharing risk so that the local merchant can be protected at reasonable rates?

There is a second respect in which the portrait of the exploitative merchant needs to be clarified. In calling attention to the fraudulent schemes employed by the local merchants and, in particular, by the door-to-door salesmen who work for companies located outside the neighborhood, I have unwittingly created the impression (one that the legitimate business community echoes) that these problems exist only because of a small class of disreputable sellers. Such a picture cmpletely ignores the fact that these unscrupulous sellers could not exist without the finance companies and banks that buy their paper. These financial institutions must share the blame for the exploitation of the poor, for they know all too well (and if they don't, they should) that they are buying dishonestly obtained contracts. Yet they do so anyway. Further, when we ask where the finance companies get the funds they need to operate, we soon discover that they often borrow from highly respectable banks. Thus, the respectable financial community is also a party to the exploitation of the poor. Many low-income consumers find that the "reasonable" payments which they have contracted to pay are, in fact, impossible to make on their limited budgets. The most obvious relief they see is simply to stop the payments. In most states non-payment precipitates a complex series of legal actions which may have very severe consequences for the consumer.

Below, an experienced attorney discusses the way in which these cases proceed.

COUNSEL FOR THE POOR CONSUMER--THE STOREFRONT PERSPECTIVE

An Interview with Ray Narral, Esq.*

Ray Narral is an attorney in charge of consumer cases in a Mobilization for Youth Legal Services Unit in New York City. Mr. Narral, reprinted below, in which he reviews strategy and principles applicable to the daily work of a legal services attorney who deals with consumer problems.

Q. Mr. Narral, what kinds of consumer problems do clients most often bring to your office?

A. Most of my clients seek legal assistance because they have entered into installment sales contracts under terms thay cannot afford, they have fallen behind in their payments, and judgments have been entered against them for the total amount due on the contract.

In a typical situation, Mr. R. comes to my office for the first time with an income execution, better known as a "garnishee." His boss has told him that somehow he'd better get it taken care of, because next week he will discharge Mr. R., rather than go through the burdensome procedure of deducting 10% of his salary and forwarding it to a City Marshal. I ask him whether he knows who has brought about the garnishee, and why. He says that some time ago he agreed to enter into a food purchase plan under which the plaintiff seller told him he would receive food to feed his family of eight for $12 a week. At the same time he signed a contract to buy a food freezer in which to store the food, on an installment contract calling for 36 monthly payments of $28 each. His first bill demanded $28 for the freezer and $98 for one month's food. This bill he paid, but the next month he received only half the food he ordered, and he refused to continue payments. He repeatedly telephoned the finance company to whom the contract had been assigned to object to the food charges and to request that he be released from the contract.

Now, three months after his last communication with the finance company, he has been told that a court action against him has resulted in a judgment for which his salary has been garnisheed. I ask Mr. R. if he was notified of any action against him, and he says no. I show him a copy of a summons and he says he never received such a paper.

It is clear that Mr. R. has been a victim of the procedure colloquially known as "sewer service," whereby process servers

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falsely swear they have personally served defendants with summonses, when they have instead "thrown the summons down a sewer." A survey conducted by Mobilization for Youth and CORE in 1965 revealed that a majority of ghetto residents never receive summonses with affidavits declare were personally served upon them.[1] Further questioning revelas that Mr. R. has received no notice of garnishment although such notice is required by statute in New York.[2]

Q. Can you help this man even after judgement has been entered against him?

A. It is certainly possible to prevent him from losing his job, since there is a statute in New York which prohibits the discharge of an employee because of a single garnishment.[3] It is therefore advisable to telephone the employer, explain the circumstances of the debt, and inform him of the statute. Moreover, if the client receives supplementary welfare payments his salary is exempt from garnishment.[4]

If the client has a valid, substantive defense to the action against him, he can remove the garnishment by moving to reopen the judgment. This requires serving the court with an affidavit that he was never served with process and with an affidavit of merit, alleging facts which show a valid defense to the original action.[5] It is imperative to question a client extensively concerning the circumstances of the sale. The facts as related by Mr. R. are that the seller sent him a leaflet advertising a food-freezer plan which would provide food for a family of eight for $12 a week. A few days later he was visited by a salesman representing the company which had sent out the leaflet. Mr. R. cannot speak or read English. He signed the contract, written in English, relying on the representations of the Spanish-speaking salesman that he would be obligated to pay $28 a month for the freezer and $48 for the food. The salesman represented that his savings on food bills would be so great that the freezer would, in effect, pay for itself.

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[1] *Default Judgments in Consumer Actions: The Survey of Defendants, A Preliminary Study by the Legal Unit of Mobilization For Youth, 1965. See also, Default Judgments, 1st and 2nd Supplemental Reports, Core Legal Department, 1965*.

[2] N.Y. CPLR § 5231 (c).

[3] N.Y. CPLR § 5252

[4] N.Y. Soc. Wel. Law § 137-a.

[5] N.Y. CPLR § 317; § 5015(a)

Mr. R. may have a defense of misrepresentation or fraud in the formation of the contract.[6] Moreover, he may be able to argue that the contract is unconscionable under § 2-302 of the Uniform Commercial Code. This is a relatively new defense as applied to consumer contracts, and we in New York are now trying to develop precedents on just what § 2-302 means and what kinds of contracts will be held unconscionable. Recently, *in Frostifresh Corp. v. Reynoso*,[7] reversing a case very similar to that of Mr. R., a New York Court held unconscionable a contract written in English for a refrigerator-freezer between a Spanish-speaking buyer and seller, which called for a cash sale price of $900 and a credit charge of $245.88. The result in *Frostifresh* was disturbing, however, because although the court of appeals agreed with the lower court's finding that the contract was "shocking to the conscience," it held that the seller could recover a reasonable profit, trucking and service charges and finance charges, even though under § 2-302 (2) the court has the power to hold the entire contract void. This case means that sellers can charge the most exorbitant rates, secure in the knowledge that at the worst they will be able to recover a reasonable profit plus all their expenses. However, if Mr. R. is willing to return the freezer in order to escape the judgment against him, we can try to avoid the result in Frostifresh by requesting the court to rescind the contract and order the seller to pick up the freezer and release the defendant from any further payments.

Ultimately we hope to establish that consumer contracts can be unconscionable because they involve exorbitant price terms. However, at this time it is necessary to allege other circumstances besides price to demonstrate that a contract is unconscionable, such as that the defendant doesn't speak English,[8] is illiterate, is a welfare recipient, earns $45 a week and the seller had knowledge of these facts;[9] that the salesman entered the home and refused to leave until the defendant signed the contract; that the salesman made misleading or false representations as to the true import of the comtract; or that the contract comtained a referral sales agreement which is unlawful as a lottery.[10]

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[6] U.C.C. § 2-721

[7] 54 Mis. 2d 119, 281 N.Y.S. 2d 964 (2d Dep't 1967) rev'g 52 Misc. 2d 26, 274 N.Y.S. 2d 757 (Dist. Ct. Nassau Co. 1966).

[8] *Id.*

[9] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir.1965).

[10] Lefkowitz v. ITM, Inc., 52 Misc.2d 39, NYS 2d 303. (Sup. Ct. 1966).

Other defenses may appear, based on the format of the contract, a copy of which should be obtained from either the client or the seller. In most consumer cases in New York involving disreputable sellers there is a defect apparent on the fact of the contract. The print must be in at least eight point type,[11] and the contract must contain, at the top and above the buyer's signature, in larger type, the words: "RETAIL INSTALLMENT CONTRACT or RETAIL INSTALLMENT OBLIGATION, and NOTICE TO THE BUYER, (1) Do not sign this agreement before you read it or if it contains any blank space. (2) You are entitled to a completely filled in copy of this agreement. (3) Under law, you have the right to pay off in advance the full amount due and under certain circumstances to obtain a partial refund of the credit service charge.[12] The contract must contain the entire agreement of the parties,[13] and an adequate description of the goods "including the make and model, if any, in the case of goods customarily sold by make and model," and details as to the various items included in the contract price.[14]

In our example, Mr. R.'s contract does not contain an adequate description of the goods. Moreover, no single contract contains the entire agreement of the parties. In food-freezer sales the agreements to buy food and the freezer are not separate transactions, but are so intertwined as to constitute one transaction and should be integrated into a single contract. The buyer agrees to the food plan only because he is getting the freezer, in which he intends to store the food. The one is the inducement for the other. Mr. R. signed two separate documents, and I believe it can be successfully argued that this violates the statute. Mr. R. also may defend because the seller breached the contract by delivering only half the food ordered during the second month. In addition, if Mr. R. did not sign the contract, but instead his wife was induced to forge his signature, he is not liable unless the contract was for necessaries of the wife.[15]

Q. After you determine which of these defenses are available, how do you go about removing the judgment against Mr. R.

A. I contact the plaintiff's attorney and ask him to consent to reopening the judgment. In most cases he will consent, because the courts nearly always grant such motions. If he refuses and on the motion to reopen the judgment the court feels that there is an issue as to whether the defendant was served, the court may hold a traverse, a hearing on the question of service. If the court is satisfied that the judgment should be reopened, a show cause order will issue staying all proceedings including the garnishment.

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[11] N. Y. Pers. Prop. L. § 402 (1).

[12] N. Y. Pers. Prop. L. § 402 (2).

[13] Id.

[14] N.Y. Pers. Prop. L. § 402 (3).

[15] N. Y. Gen. Obl. L. § 3-305

When the plaintiff learns that the buyer intends to defend the case against him, in 95% of our cases he offers to settle for much less than the contract price. A seller or a finance company depends on being able to move against defendants and obtain default judgments and immediate income execution without opposition. Plaintiffs will settle in the fact of even slight pressure, because it is cheaper than prosecuting in court. Settlement offers are so advantageous that we have difficulty finding clients willing to take even the most fraudulent sellers to court. Often when a contract is for $500, of which the buyer has paid $30, and the seller claims additional court costs of $130, the seller will offer to accept $50 in settlement. In other cases, a portion of the debt has already been garnisheed, and buyer and seller agree to settle for that amount.

Once in a while a client is so disgusted with a disreputable merchant that he is willing to contest a sale in court no matter how favorable a settlement is offered. When a client is a welfare recipient we advise him that should he lose a court action the seller will be unable to collect on his judgment, since welfare funds cannot be levied upon.[16] It is imperative, however, to advise the client at the same time that the judgment will remain enforceable against him for 20 years.[17]

We are investigating the possibility of inducing public spirited local businesses to offer to reimburse buyers for any losses they sustain because they have chosen to defend in Court in order to challenge unethical sales practices. For example, if the buyer refuses a $50 settlement offer and then loses his suit with judgment entered against him for $170, the private sponsor would pay $120 of the judgment.

Q. If Mr. R. agrees to take his case to court, how would you prepare for trial?

A. In all such cases, I use every available means of discovery, including interrogatories, bills of particulars and subpoenas of the plaintiff's business records. A pre-trial hearing should be held, preferably in the defense attorney's office.

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[16] N. Y. Soc. Wel. L. § 137

[17] N.Y. CPLR § 211 (b).

We usually discover that the plaintiff is a finance company claiming no knowledge of the seller's business, and asserting that he is a holder in due course of the contract executed by the defendant and no defense is valid against him although it might be valid against the seller. I then join the original seller as a third party defendant.[18] In addition to permitting adjudication of the seller's wrongdoing, joiner allows me to examine him as to the facts of the sale. I can examine the seller's records to determine the wholesale value of the item sold, his markup and costs, and the remaining finance charges.

Q. Can you successfully meet the plaintiff's claim to protected status as a holder in due course?

A. Yes, because it is often possible to show that in fact the finance company is not a holder in due course. When the company and the original seller are so interrelated that the finance company knew or should have known that the seller's contracts were fraudulent or unconscionable, then his status may be destroyed.[19] Thus we might present evidence that the finance company has printed the contract or its name appears on the contract, or that the company and the seller use the same or contiguous office space, or that the same persons are the heads of both businesses. Discovery procedures should be used to determine the exact relationship between seller and finance company.

Mobilization For Youth has proposed to the New York Legislature that, by statute, whenever the holder takes any part in the formation of the contract his status should be withdrawn, and when a seller assigns 75% of his contracts to one finance company that company should be deemed to know the nature of the operations of the seller and should not be held to have taken in good faith for value. If the Attorney General has received many complaints about a particular seller, several of which have been made known to the finance company, I will subpoena the Attorney General to testify to this fact. We have also recommended legislation requiring that if there are such documented reports indicating a fraudulent scheme on the part of the seller, the holder should be deemed to have knowledge of such reports and therefore not to have taken in good faith.

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[18] N. Y. CPLR § 1002 (b)

[19] Nassau Discount Corp. v. Allen, 44 Misc. 2d 1007, 262 N.Y.S. 2d 967 (Civ. Ct. Kings Co. 1965).

In most of our cases, and in Mr. R.'s case, the finance company has not given the buyer notice as required by statute that it has purchased the contract and any complaints he wishes to assert regarding the sale must be brought to the attention of the finance company within ten days.[20] This notice, required to perfect the status of the holder, is effective when mailed. Yet, if sent at all, it is hidden among several insurance policies, a coupon book and envelopes, and directions for making monthly payments. It is rarely read or understood. Moreover, their default judgment study, Mobilization and CORE discovered that one out of three letters of a sample of 450 sent at random were returned "addressee unknown," whereas subsequent personal investigation showed that the bulk of the addresses actually lived at the addresses stated on the letter.[21] Therefore, another of our legislative recommendations is to require that this notice be by certified mail, return receipt requested. The receipt should be two-fold, one as to the actual envelope, and one to be mailed by the buyer indicating that he has actually received both notice of the assignment and a copy of the contract. Because sellers often fail to give buyers copies of their completed contracts, we think the law should require that a copy of the contract be sent with the assignment notice, to insure the buyer's receiving the contract and realizing to what contract the assignment refers.

Q. Once you are permitted to put forth your defenses against the seller, how can you present proof as to the circumstances surrounding the sale in order to establish the defense of unconscionability, given the hearsay and parole evidence rules?

A. Under UCC § 2-302, once the defendant alleges a prima facie case of unconscionability, the court may hear evidence on the totality of the circumstances surrounding the sale.[22] In a typical case we would be able to call as witnesses the defendant and any others present during the sale to testify to the representations of the seller. In Mr. R.'s case we could introduce the leaflets sent by the seller describing the food-freezer plan. Since the relationship of the total contract price to the value of the goods is material to an unconscionability defense, we would try to locate a dealer to testify as an expert as to the wholesale cost of the item sold and the usual markup on the item in the trade. Dealers are not often willing to testify against a competitor. To find one who will do so I often write to the manufacturer or wholesaler of the product and request the names of any dealers in the area who carry the item and then ask all of these dealers to appear in my case.

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[20] N.Y. Per. Prop. L. § 403 (3) (a).

[21] Authorities cited note 1 _supra_.

[22] _U.C.C._ § 2-302 (2).

Q. Will the case usually be tried before a jury?

A. The defendant always prefers a jury trial; the plaintiff never does. In fact most retail installment sales contracts include a clause whereby the buyer waives his right to fury trial. This can be challenged if we are alleging that the contract was entered into fraudulently. However, it takes two years to obtain a jury trial in New York, so I do not often request one.

Q. We've been discussing a buyer who has been severely victimized by an unscrupulous seller. What about the man who simply buys something he doesn't want, something he was talked into buying by an overbearing salesman?

A. That happens very often. Sometimes a client comes in and says, I have received these goods; they are just what I ordered, but I don't want them and I can't afford to pay for them. Sometimes he even says he understood the contract, although he may claim he was overpowered by the sales ptich or the salesman refused to leave his apartment until he signed the contract.

I usually call the seller, explain the situation, and ask that he cancel the contract and accept return of the goods. If the seller refuses, which does not happen often, we must wait until he brings suit for payment and then attempt settlement through the plaintiff's attorney. Usually we are able to arrange a compromise for much less than the purchase price.

In other instances a client comes to me because the item he purchased is unsatisfactory in some way, and the seller does not respond to his complaints. The client may have bought a television that breaks down repeatedly within months after its purchase. In such a case, if I personally cannot obtain cooperation from the seller, I bring an affirmative action for rescission and damages under the breach of warranty sections of the UCC.[23]

A related problem occurs when a client contracts to purchase an item, leaves a deposit, and when he returns to take possession a day later he discovers that the seller wants to deliver a different item, inferior in quality, or demands that the client produce several cosigners to guarantee his obligation under the contract. When a buyer tries to reject the substituted goods, or is unable to produce the requisite co-signers, the seller refuses to honor the contract or to return the deposit, particularly because a suit for rescission which requests only the return of a deposit is usually successful.

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[23] UCC §§ 2-313-318.

Q. Do sellers ever resort to illegal collection procedures or invasions of privacy?

A. I rarely find that a creditor has unlawfully invaded a client's privacy. Clients are often harassed by "dunning letters," which means that they are inundated with mail telling them they must pay the debt or the creditor will tell their neighbors and inform their employer and bring about their discharge.

Sellers and finance companies want their money, not the item purchased. Often when the buyer wants to return the goods to avoid payment, the seller insists on the purchase price instead, because the goods have no resale value. For this reason, buyers are not often victimized by illegal repossession techniques. Repossession is useful to sellers as a threat, not because it insures them an adequate return on their contracts.

Occasionally default judgments are enforced by a general levy on the defendant's property. A client may come to me after having received notice that on a particular day a marshal will come to his home and prepare to sell his personal property to satisfy a debt. Actually most of the client's possessions will be exempt from sale.[24] In such a situation I advise the marshal that the articles to be levied on are exempt and he usually does not pursue the execution.

Q. Do you often utilize bankruptcy proceedings to help your clients avoid burdensome debts?

A. I've used it only four times in four years. Bankruptcy is a very extreme remedy which should be used only in very, very severe cases, when a client is in debt to a great degree and has no possible hope of paying off everything he owes. It is an extreme remedy because once a client is discharged in bankruptcy he cannot be similarly discharged for the next six years, and because credit is totally unavailable to a bankrupt, even in the ghetto.

Q. You mean the same storekeeper who sells a $500 stereo on time to a welfare recipient will suddenly refuse credit to a buyer because he once declared bankruptcy?

A. Yes, because the finance companies refuse to purchase the installment sales contracts of buyers who are bankrupt. There is a central file of all bankruptcies in a given community, and the finance companies check this file before they purchase any installment contract.

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[24] N.Y. CPLR § 5202

Moreover, bankruptcy for the low income buyer may not discharge all debts. If a creditor can prove any fraud on the part of the debtor, his debt will not be discharged under bankruptcy proceedings.[25] Thus, if the debtor failed to list a single existing debt when he applied for credit the creditor may be able to claim fraud. Often ghetto sellers induce this kind of omission by their customers, just to protect themselves against later bankruptcy proceedings.

Q. How badly in debt would a client have to be before you recommended bankruptcy?

A. One of my bankruptcy cases involved a couple who owed approximately $4,000. Both were unemployed and they had applied for but not yet received welfare. If the same couple had owed $1,000 or $2,000 I would not have suggested bankruptcy proceedings.

Q. Are there any public agencies to which a consumer who has been harmed by unlawful sales practices can turn?

A. The Attorney General's Office, Consumer Frauds Bureau, and the Banking Commission, which licenses finance companies, investigate consumer complaints. Yet these agencies cannot redress the wrongs done to an individual buyer, as they are investigatory. They may bring criminal or civil suit to halt a pattern of illegal practices. If an individual registers a complaint with the Attorney General's Office, an agent will telephone the seller and ask him to rescind the sale. If the seller refuses, the buyer is told to get his own lawyer. Thus, it is largely left to the lawyer serving the poor to extricate individuals from oppressive contracts.

Q. What sort of impact do you feel you, as a legal services lawyer, have made on the community you serve?

A. In several instances when we have defended four or five suits in succession against particular sellers, they have gone out of business. We like to think that in turn other businessman in the neighborhood have changed some of their practices rather than risk losing their businesses.

I have taken part in the consumer education programs of some of Mobilization's social action units. We have chartered several cooperative buying clubs on the Lower East Side, in which housewives pool their weekly grocery lists, order the food they need from wholesalers, and distribute it among themselves. Such clubs provide enormous savings to members and exert pressures on community retailers to lower their prices.

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[25] N. Y. Deb. Cr. L. § 87

Finally, a legal service unit can pinpoint and publicize defects in our legal system which place the poor at a disadvantage and can propose legislative and administrative remedies for those defects.

But the most important impact a legal services unit can make on the community is to convince the poor that the law is not always on the side of the rich. When a client is extricated from an unfair and unjust sales agreement or garnishment he and his neighbors feel a greater respect for our legal system, for themselves and for the larger society of which they are a part.

Comment: Protection of the Sellers.

Sellers are protected from default of the Buyer in two main ways: the contract itself and statutes which provide for collection from the buyer through legal machinery. Most consumer credit contracts contain clauses in which the buyer agrees to give the seller his power of attorney if he defaults or confesses in advance to charges of default. This means that, according to the contract, he is giving up his right to defend himself in court from action by the seller. This simplifies the procedure of repossession and/or forceable payment by eliminating the necessity of having the buyer in the court when the case is decided.

The second point of strength for the seller is the statute which allows him to use the court to collect his debts. In most states there is a provision for "attachment," or "garnishment" of the buyer's property. Attachment refers to taking property held by the defendant buyer as payment. Garnishment is the taking of the defendant's property which is in possession of a third person. This is usually applied to the defendant's wages. See "Wage Garnishment in California: A Study and Recommendations." George Brann 53 Cal. Law Review #5, December, 1965.

Legislative Remedies for Consumer Protection

Historically, most of the law dealing with the relations between buyers and sellers was a hodgepodge of statutes and the Common Law. Part of the confusion was supposed to be remedied by the Uniform Commercial Code which has been adopted in almost all of the states. However, the code and all of the old law is primarily concerned with the relationships of business buyers and sellers and not really with the problems of the individual consumer in the retail market. Even more importantly, the UCC does not deal in any detail with the credit relationship between an individual retail consumer and the seller or the sellers' assignees.

A Model Consumer Credit Code has been drafted and some states are now looking seriously at the needs for adopting it or otherwise codifying some of its remedies. Many states, particularly those with large urban concentrations have already passed some laws aimed at helping the Consumer. In some states, for example, buyers have been given a grace period of up to three days to cancel credit agreements made with door to door salesmen. Connecticut passed a number of consumer protection statutes in 1967, any of which might be models for other legislation. One of the most interesting is that controlling Home Solicitation and Referral Sales. Studies have shown that low-income people are particularly easy prey for fraudulent and high pressure sales in their homes. Some of the tactics used by many such salesmen are not only deceptive, but occasionally have an element of physical menace. This statute aims to give the buyer a chance to think things over without the pressuring presence of the salesman hovering over him. Notice, however, that one of the weaknesses of the act is its assumption that the poor consumer has some notion of what his rights are under the contract that he has signed, or according to the statute.

AN ACT CONCERNING HOME SOLICITATION AND REFERRAL SALES

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. As used in this act, "home solicitation sale" means a sale of goods or services in which the seller or his representative solicits the sale and the buyer's agreement or offer to purchase is made at a home other than that of the person soliciting the same, and all or any part of the purchase price is payable in installments, or a debt incurred for payment of the purchase price is payable in installments. A sale which otherwise meets the definition of a home solicitation sale except that it is a cash sale shall be deemed to be a home solicitation sale if the seller makes or provides a loan to the buyer or obtains or assists in obtaining a loan for the buyer to pay the purchase price.

Section 2. (a) In addition to any right otherwise to revoke an offer, the buyer may cancel a home solicitation sale until midnight of the first calendar day after the day on which the buyer signs an agreement subject to the provisions of this act except if the signing is on a Friday, Saturday or Sunday, the notice of cancellation shall be posted not later than midnight of the Monday immediately following. (b) Cancellation shall occur when the buyer gives written notice of cancellation to the seller at the address specified for notice of cancellation provided by the seller or when such written notice bearing such address is deposited in a mail box certified mail, return receipt requested. (c) Notice of cancellation given by the buyer shall be effective if it indicates the intention on the part of the buyer not to be bound by the home solicitation sale.

Section 3. No agreement of the buyer in a home solicitation sale shall be effective unless it is signed and dated by the buyer and unless it contains a conspicuous notice in ten-point bold-face type or larger directly above the space reserved in the agreement for the signature of the buyer: NOTICE TO BUYER: (1) Do not sign this agreement if any of the spaces intended for the agreed terms to the extent of then available information are left blank. (2) You are entitled to a copy of this agreement at the time you sign it. (3) You may at any time pay off the full unpaid balance due under this agreement, and in so doing you may receive a partial rebate of the finance and insurance charges. (4) The seller has no right to enter unlawfully your premises or commit any breach of the peace to repossess goods purchased under this agreement. (5) You may cancel this agreement if it has not been signed at the main office or a branch office of the seller, provided you notify the seller at his main office or branch office shown in the agreement by certified mail, return receipt requested which shall be posted not later than midnight of the first calendar day after the day on which the buyer signs the agreement, except if the signing is on Friday, Saturday or Sunday, the cancellation shall be posted not later than midnight of the Monday immediately following.

Section 4. (a) Except as provided in this section, within ten days after a home solicitation sale has been cancelled the seller shall tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness. (b) If the down payment includes goods traded in, the goods shall be tendered in substantially as good condition as when received. If the seller fails to tender the goods as provided by this section, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement. (c) The seller may retain as a cancellation fee five per cent of the cash price, fifteen dollars or the amount of the cash down payment, whichever is less. If the seller fails to comply with an obligation imposed by this section, or if the buyer avoids the sale on any ground independent of his right to cancel under subsection (a) of section 2 of this act, the seller is not entitled to retain a cancellation fee. (d) Until the seller has complied with the obligations imposed by this section the buyer may retain possession of goods delivered to him by the seller and has a lien on the goods for any recovery to which he is entitled.

Section 5. (a) Any note or other evidence of indebtedness given by a buyer in respect of a home solicitation sale shall be dated not earlier than the date of the agreement or offer to purchase. Any transfer of a note or other evidence of indebtedness bearing the statement required by subsection. (b) of this section shall be deemed an assignment only and anyright, title or interest which the transferee may acquire thereby shall be subject to all claims and defenses of the buyer against the seller arising under the provisions of this act. (b) Each note or other evidence of indebtedness given by a buyer in respect of a home solicitation sale shall bear on its face a conspicuous statement as follows: THIS INSTRUMENT IS BASED UPON A HOME SOLICITATION SALE, WHICH SALE IS SUBJECT TO THE PROVISIONS OF THE HOME SOLICITATION SALES ACT. THIS INSTRUMENT IS NOT NEGOTIABLE. (c) Compliance with the requirements of this section shall be a condition precedent to any right of action by the seller or any transferee of an instrument bearing the statement required under subsection (b) of this section against the buyer upon such instrument and shall be pleaded and proved by any person who may institute action or suit against a buyer in respect thereof. (d) A promissory note payable to order or bearer and otherwise negotiable in form issued in violation of this section may be enforced as a negotiable instrument by a holder in due course according to its terms.

Section 6. (a) Except as provided in subsection (d) of section 4 of this act, within twenty days after a home solicitation sale has been canceled the buyer, upon demand, shall tender to the seller any goods, delivered by the seller pursuant to the sale, but he is not obligated to tender at any place other than his own address. If the seller fails to take possession of such goods within twenty days after cancellation the goods shall become the property of the buyer without obligation to pay for them. (b) The buyer shall take reasonable care of the goods in his possession both prior to cancellation and during the twenty-day period following. During the twenty-day period after cancellation, except for the buyer's duty of care, the goods are at the seller's risk. (c) If the seller has performed any services pursuant to a home solicitation sale prior to its cancellation, the seller is entitled to no compensation except the cancellation fee provided in this act. If the seller's services result in the alteration of property of the buyer, the seller shall restore the property to substantially as good condition as it was in at the time the services were rendered.

Section 7. No seller in a home solicitation sale shall offer to pay a commission or give a rebate or discount to the buyer in consideration of the buyer's giving to the seller the name of prospective purchasers or otherwise aiding the seller in making a sale to another person, if the earning of the commission, rebate or discount is contingent upon an event subsequent to the time the buyer agrees to buy.

Section 8. Any person who violates any provision of this act shall be fined not more than five hundred dollars or imprisoned not more than ninety days or both. Any sale made in respect to which a commission, rebate or discount is offered in violation of the provisions of this act shall be voidable at the option of the buyer.

Section 9. The provisions of this act shall not apply to the solicitation or sale of insurance.

Section 10. This act may be cited as the "Home Solicitation Sales Act."

The Federal government has also begun to be active in the field of consumer legislation. The Federal Trade Commission was originally envisioned as doing some work in the area of consumer protection. However, in fact that agency has concerned itself almost solely with the conflicts between businesses and has done very little in the past to protect the consumer. (See "The F. T. C. and the War on Poverty," D. J. Baum 14 UCLA L. Review 1071, 1967). There is some feeling that the direction of the commission may change radically after the very critical reports issued by Ralph Nader and subsequently by the American Bar Association.

None-the-less, to the present the most significant aid which the federal government has offered the consumer is the Federal Truth-in-Lending Statute.

The Federal Truth-in-Lending statute does not regulate the amount of the charge for credit, but simply requires that the charge be stated in a clear and concise way. One of the reasons for the statute was to attempt to make the consumer aware of the dollar amount that he was paying for credit as well as of the percentage rate. Additionally, it was hoped that the operation of the Truth-in-Lending rules would encourage the low-income consumer to "shop around" for the best credit buy possible. The theory is certainly benevolent; however, the problem is that the low-income consumer is the citizen least likely to have many sources of credit from which to choose.

Following is an explanation of the Act prepared for creditors, sellers and finance institutions, who must comply with the Truth-in-Lending bill. Also following, are two sample contracts which comply with the requirements of the statute.*

Q. What is the finance charge?

A. It is the total of all costs which your customer must pay, directly or indirectly for obtaining credit. (Reg. Z/226.4)

Q. What costs are included in the finance charge?

A. Here are some of the more common items that you must include in your finance charge. See Reg. Z/226.4 for others and for qualifications which apply.

1. Interest
2. Loan fee
3. Finders fee or similar charge.
4. Time price differential.
5. Amount paid as a discount.
6. Service, transaction or carrying charge.
7. Points.
8. Appraisal fee (except in real estate transactions).
9. Premium for credit life or other insurance, should you make this a condition for giving credit.
10. Investigation or credit report fee (except in real estate transactions).

Q. Are all costs part of the finance charge?

A. No, some costs which would be paid if credit were not employed may be excluded. However, you must itemize and show them to your customer. (Reg. Z/226.4 gives a complete list). Here are a few examples:

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* Quoted from "What You Ought to Know About Truth-in-Lending, Consumer Credit Cost Disclosure." Prepared by the Federal Reserve System Board of Governors.

1. Taxes.
2. License fees.
3. Registration fees.
4. Certain title fees and other legal fees.
5. Some real estate closing fees.

Q. In what form is the finance charge to be shown to the customer?

A. It must be clearly type or written, starting the dollars and cents total and the annual percentage rate. The words "finance charge" and "annual percentage rate" must stand out especially clear. (Reg. Z/226.6 (a)). In the sale of dwellings, the total dollar finance charge need not be stated, although the annual percentage rate must be included.

Q. What is the annual percentage rate?

A. Simply put, it is the relative cost of credit in percentage terms. (Reg. Z/226.5(e)).

Q. Are maximum or minimum rates specified in Regulation Z?

A. No. Regulation Z does not fix maximum, minimum, or any charges for credit. But it requires that you show whatever rate you do charge.

Q. Do you ever have a choice about how you state the annual percentage rate?

A. Before Jan. 1, 1971 you have the option to disclose the annual percentage rate in dollar terms. For example -- "$11 finance charge per year per $100 of unpaid balance." However, beginning Jan. 1, 1971, the rate must be stated as a percentage (Reg. Z/226.6(j)).

Cases: A Consumer's Defense

One of the best defenses that consumers have in cases in which they are being sued for non-performance is that the contract was "unconscionable." The exact definition of unconscionable is subject to debate among lawyers and judges. The term is used in the Uniform Commercial Code as an allowable defense, but is not clearly defined even there. The point of this vagueness is to give the courts some leeway in deciding consumer cases. One possible definition suggests that unconscionable may refer to a contract which is unfair because of gross inequality of bargaining power, especially if the most unfair terms are not clearly understood by one of the parties. (See Bargaining Power and Unconscionability; A Suggested Approach to UCC Section 2-302, 114 U. of Pa. L. Rev. 998 (1966).

The following cases give some views of the definition of unconscionability.

AMERICAN HOME IMPROVEMENT, INC.
v.
Morris J. MacIver et al.
Supreme Court of New Hampshire.
Hillsborough.
Argued May 5, 1964.
Decided July 1, 1964.

Action against homeowners for breach of alledged agreement for home improvements. The Court, Grimes, J., reserved and transferred without ruling questions of law arising out of defendants' motion to dismiss. The Supreme Court, Kenison, C. J., held that where application for financing home improvements and approval of financing failed to inform homeowners of rate of interest or amount of interest or other charges or fees they were paying, extension of credit was in violation of statute requiring disclosure of finance charges to borrower by lender.

Remanded.

This is an agreed case submitted on exhibits and certain stipulated facts. The plaintiff seeks to recover damages for breach by the defendants of an alledged agreement for home improvements. The agreement (Exhibit No. 1) was signed by the defendants April 4, 1963 and it provided that the plaintiff would "furnish and install 14 combination windows and 1 door" and "flintcoat" the side walls of the defendants' property at a cost of $1,759. At the same time the defendants signed an application for financing to a finance corporation (Exhibit No. 2). This application also contained a bank note and a blank power of attorney to the finance corporation which were undated and were signed by the defendants. The application stated the total amount due, the number of months that payments were to be made (60) and the monthly payment but did not state the rate of interest. The defendants received a copy of exhibit 2 on April 4, 1963.

"At some time after April 7, 1963, the defendants received notice of approval of the application for financing * * * Exhibit A." This exhibit stated that the application for credit in the net amount of $1,759 had been approved and that the monthly payments would be $42.81 for 60 months "including principal, interest and life and disability insurance."

"It is further agreed that on or about April 9, 1963 the defendants notified the plaintiff to cease work on the defendants' premises, and plaintiff complied. By April 9, the plaintiff had done a negligible amount of work on the premises but had already paid a sales commission of Eight Hundred Dollars ($800.00) in reliance upon the contract. It is agreed that the plaintiff did not willfully violate any provision of RSA 399-B."

The defendants moved to dismiss on the ground that the action could not be maintained because the plaintiff failed to comply with the provision of RSA 399-B (supp); Laws 1961, 245:7 which requires disclosure of finance charges to the borrower by the lender. The Court (Grimes, J.) reserved and transferred without ruling questions of law arising out of the defendants' motion to dismiss.

KENISON, Chief Justice.

RSA 399-B:2 (supp) as enacted by laws 1961, 245:7 provides as follows: "Statement Required. Any person engaged in the business of extending credit shall furnish to each person to whom such credit is extended, concurrently with the consummation of the transaction or agreement to extend credit, a clear statement in writing setting forth the finance charges, expressed in dollars, rate of interest, or monthly rate of charge, or a combination thereof, to be borne by such person in connection with such extension of credit as originally scheduled." Credit is defined broadly in the act and includes any " * * * contract of sale of property or services, either for present or future delivery, under which part or all of the price is payable subsequent to the making of such sale or contract * * *." RSA 399-B:1 1 (supp). The definition of finance charges" * * * includes charges such as interest, fees, service charges, discounts, and other charges associated with the extension of credit." RSA 399-B:1 11.

(1,2) The first question is whether credit was extended to the defendants in compliance with the statute. The application for financing (Exhibit No. 2) and the approval of the financing (Exhibit A) informed the defendants of the monthly payments, the time credit was extended (60 months) and the total amount of the credit extended but neither of them informed the defendants the rate of interest, or the amount of interest or other charges or fees they were paying. This is not even a token compliance with the statute which requires " * * * a clear statement in writing setting forth the finance charges, expressed in dollars, rate of interest, or monthly rate of charge or a combination thereof * * *." RSA 399-B:2 (supp). The obvious purpose of the statute was to place the burden on the lender to inform the borrower in writing of the finance charges he was to pay. This burden was not met in this case. Annot. 116 A. L. R. 1363. Disclosure statutes are designed to inform the uninformed and this includes many average individuals who have neither the capability nor the strength to calculate the cost of the credit that has been extended to them. Economic Institutions and Value Survey: The Consumer in the Market Place -- A Survey of the Law of Informed Buying, 38 Notre Dame Lawyer 555, 582-588 (1963); Ford Motor Co. v F. T. C., 6 Cir., 120 F. 2d 175, 182 (6th Cir. 1941). RSA 339-B:3 (supp) provides that "(no) person shall extend credit in contravention of this chapter." We conclude that the extension of credit to the defendants was in violation of the disclosure statute.

The parties have agreed that the plaintiff did not willfully violate the disclosure statute and this eliminates any consideration of RSA 399-B:4 (supp) which provides a criminal penalty of a fine of not more than five hundred dollars or imprisonment not more than sixty days, or both. This brings us to the second question whether the agreement is "void so as to prevent the plaintiff from recovering for its breach."

"At first thought it is sometimes supposed that an illegal bargain is necessarily void of legal effect, and that an illegal contract is self-contradictory. How can the illegal be also legal? The matter is not so simple." 6 A Corbin, Contracts, s. 1373 (1962) The law is not always black or white and it is in the flexibility of the gray areas that justice can be done by a consideration of the type of illegality, the statutory purpose and the circumstances of the particular case. "It is commonly said that illegal bargains are void. This statement, however, is clearly not strictly accurate." 5 Williston, Contracts (Rev. ed. 1937) s. 1630. The same thought is well summarized in 6 A Corbin, Contracts, s. 1512 (1962): "It has often been said that an agreement for the doing of that which is forbidden by statute is itself illegal and necessarily unenforceable." This section was cited in the recent case of William Coltin & Co. v. Manchester Savings Bank, 105 N.H. 254, 197 A2d 208, holding unenforceable a contract for a broker's commission for the sale of real estate without a license in violation of a statute.

(3) In examining the exhibits and agreed facts in this case we find that to settle the principal debt of $1,759 the defendants signed instruments obligating them to pay $42.81 for 60 months, making a total payment of $2,568.60, or an increase of $809.60 over the contract price. In reliance upon the total payment the defendants were to make the plaintiff pay a sales commission of $800. Counsel suggests that the goods and services to be furnished the defendants thus had a value of only $959, for which they would pay an additional $1,609.60 computed as follows:

"Value of goods and services		$ 959.00
Commission	800.00	
Interest and carrying charges	809.60	1,609.60
Total payment		$2,568.60"

In the circumstances of the present case we conclude that the purpose of the disclosure statute will be implemented by denying recovery to the plaintiff on its contract and granting the defendants' motion to dismiss. Burque v. Brodeur, 35 N. H. 310, 158A. 127; Park, Board of Aviation Trustees v. Manchester, 96 N. H. 331, 76 A.2d 514; Albertson & Co. v. Shenton, 78 N. H. 216, 98 A. 516.

There is another and independent reason why the recovery should be barred in the present case because the transaction was unconscionable. "The courts have often avoided the enforcement of unsonscionable provisions in long printed standardized contracts, in part by the process of 'interpretation' against the parties using them, and in part by the method used by Lord Nelson at Copenhagen." 1 Corbin, Contracts, s. 128 (1963). Without using either of these methods reliance can be placed upon the Uniform Commercial Code (U. S. S. 2-302 (1)). See RSA 382-A:2-302 (1) which reads as follows: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

(4) Inasmuch as the defendants have received little or nothing of value and under the transaction they entered into they were paying &1,609 for goods and services valued at far less, the contract should not be enforced because of its unconscionable features. This is not a new thought or a new rule in this jurisdiction. See Morrill v Bank, 90 N. H. 358, 365, 9 A.2d 519, 525; "It has long been the law in this state that contracts may be declared void because unconscionable and oppressive * * *."

The defendants' motion to dismiss should be granted. In view of the result reached it is unnecessary to consider any other questions and the order is

Remanded.

All concurred.

Ora Lee WILLIAMS, Appellant,

v.

WALKER-THOMAS FURNITURE COMPANY, Appellee.

William THORNE et al., Appellants,

v.

WALKER-THOMAS FURNITURE COMPANY, Appellee.

Nos. 18604, 18605.

United States Court of Appeals
District of Columbia Circuit.
Argued April 9, 1965.
Decided August 11, 1965.

Suits by furniture company to recover on contracts under which balance due on every item purchased continued until balance due on all items, whenever purchased, was liquidated. The Court of General Sessions granted judgment for furniture company and appeal was taken. The District of Columbia Court of Appeals affirmed and appeal was taken. The United States Court of Appeals for the District of Columbia Circuit, J. Skelly Wright, Circuit Judge, held that where element of unconscionability is present at time contract is made, contract should not be enforced and that inasmuch as trial court and appelate court had not recognized that contracts could be unenforceable on that basis and record was not sufficient for Court of Appeals to decide issue as matter of law, cases must be remanded to trial court for further proceedings.

Case remanded.

Danaher, Circuit Judge, Dissented.

J. SKELLY WRIGHT, Circuit Judge:

Appellee, Walker-Thomas Furniture Company, operates a retail furniture store in the District of Columbia. During the period from 1957 to 1962 each appellant in these cases purchased a number of household items from Walker-Thomas, for which payment was to be made in installments. The terms of each purchase were contained in a printed form contract which set forth the value of the purchased item and purported to lease the item to appellant for a stipulated monthly rent payment. The contract then provided, in substance, that title would remain in Walker-Thomas until the total of all the monthly patments made equalled the stated value of the item at which time appellants could take title. In the event of a default in the payment of any monthly installment, Walker-Thomas could repossess the item.

The contract further provided that "the amount of each periodical installment payment to be made by (purchaser) to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by (purchaser) under such prior leases, bills or accounts; and all payments now and hereafter made by (purchaser) shall be credited pro rata on all outstanding leases, bills and accounts due the Company by (purchaser) at the time each such payment is made." Emphasis added. The effect of this rather obscure provision was to keep a balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.

On May 12, 1962, appellant Thorne purchased an item described as a Daveno, three tables, and two lamps, having total stated value of $391.10. Shortly thereafter, he defaulted on his monthly payments and appellee sought to replevy all the items purchased since the first transaction in 1958. Similarly, on April 17, 1962, appellant Williams bought a stereo set of stated value of $514.95 [1]. She too defaulted shortly thereafter, and appellee sought to replevy all the items purchased since December, 1957. The Court of General Sessions granted judgment for appellee. The District of Columbia Court of Appeals affirmed, and we granted appellants' motion for leave to appeal to this court.

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[1] At the time of this purchase her account showed a balance of $164 still owing from her prior purchases. The total of all the purchases made over the years in question came to $1,800. The total payments amounted to $1,400.

Appellants' principal contention, rejected by both the trial and the appellate courts below, is that these contracts, or at least some of them, are unconscionable and, hence, not enforeable. In its opinion in Williams v. Walker-Thomas Furniture Company, 198 A.2d 914, 916 (1964), the District of Columbia Court of Appeals explained its rejection of this contention as follows:

"Appellant's second argument presents a more serious question. The record reveals that prior to the last purchase appellant had reduced the balance in her account to $164. The last purchase, a stereo set, raised the balance due to $678. Significantly, at the time of this and the preceding purchases, appellee was aware of appellant's financial position. The reverse side of the stereo contract listed the name of appellant's social worker and her $218 monthly stipend from the government. Nevertheless, with full knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a $514 stereo set.

"We cannot condemn too strongly appellee's conduct. It raises serious questions of sharp practice and irresponsible business dealings. A review of the legislation in the District of Columbia affecting retail sales and the pertinent decisions of the highest court in this jurisdiction disclose, however, no ground upon which this court can declare the contracts in question contrary to public policy. We note that were the Maryland Retail Installment Sales Act, Art. 83 §§ 128-153, or its equivalent, in force in the District of Columbia, we could grant appellant appropriate relief. We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar."

We do not agree that the court lacked the power to refuse enforcement to contracts found to be unconscionable. In other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable. While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel. In Scott vs. United States, 79 U. S. (12 Wall.) 443, 445, 20

L. Ed. 433 (1870), the Supreme Court stated:

> " * * * If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitable entitled to. * * *

Since we have never adopted or rejected such a rule, the question here presented is actually one of first impression.

(1, 2) Congress has recently enacted the Uniform Commercial Code, which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made. 28 D. C. Code SS 2-302 (Supp. IV 1965). The enactment of this section, which occurred subsequent to the contracts here in suit, does not mean that the common law of the District of Columbia was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the District of Columbia. In fact, in view of the absence of prior authority on the point, we consider the congressional adoption of SS 2-302 persuasive authority for following the rationale of the cases from which the section is explicitly derived. Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.

(3-10) Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.[2] The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain.[3] But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

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[2] See Henningsen v. Bloomfield Motors, Inc., supra Note 2, 161 A.2d at 86, and authorities there cited. Inquiry into the relative bargaining power of the two parties is not an inquiry wholly divorced from the general question of unconscionability, since a one-sided bargain is itself evidence of the inequality of the bar-

(11-13) In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor

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gaining parties. This fact was vaguely recognized in the common law doctrine of intrinsic fraud, that is, fraud which can be presumed from the grossly unfair nature of t the terms of the contract. See the oft-quoted statement of Lord Hardwicke in Earl of Chesterfield v. Janssen, 28 Eng. Re. 82, 100 (1751):

" * * * (Fraud) may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make * * *."

And cf. Hume V. United States, supra Note 3, 132 U. S. at 413, 10 S. Ct. at 137, where the Court characterized the English cases as "cases in which one party took advantage of the other's ignorance of arithmetic to impose upon him, and the fraud was apparent from the fact of the contracts." See also Greer v. Tweed, supra Note 3.

[3] See Restatement, Contracts § 70 (1932); Note, 63 Harv. L. Rev. 494 (1950). See also Daley v. People's Building, Loan and Savings Association, 178 Mass. 13, 59 N. E. 452, 453 (1901), in which Mr. Justice Holmes, while sitting on the Supreme Judicial Court of Massachusetts, made this observation:

can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case. Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." I CORBIN, op. cit. supra Note 2.[4] We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract.

(14) Because the trial court and the appellate court did not feel that enforcement could be refused, no findings were made on the possible unconscionability of the contracts in these cases. Since the record is not sufficient for our deciding the issue as a matter of law, the cases must be remanded to the trial court for further proceedings.

So ordered.

DANAHER, Circuit Judge (dissenting):

The District of Columbia Court of Appeals obvisously was as unhappy about the situation here presented as any of us can possibly be. Its opinion in the Williams case, quoted in the majority text, concludes: "We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar."

My view is thus summed up by an able court which made no finding that there had actually been sharp practice. Rather the appellant seems to have known precisely where

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" * * * Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own. * * * It will be understood that we are speaking of parties standing in an equal position where neither has any oppressive advantage of power * * *."

[4] See Henningsen v. Bloomfield Motors, Inc., supra Note 2; Mandel v. Liebman, 303 N. Y. 88, 100 N. E. 2d 149 (1951). The traditional test as stated in Greer v. Tweed, supra Note 3, 13 abb. Pr., N S. at 429, is "such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other."

she stood.

There are many aspects of public policy here involved. What is a luxury to some may seem an outright necessity to others. Is public oversight to be required of the expenditures of relief funds? A washing machine, e. g., in the hands of a relief client might become a fruitful source of income. Many relief clients may well need credit, and certain business establishments will take long chances on the sale of items, expecting their pricing policies will afford a degree of protection commensurate with the risk. Perhaps a remedy when necessary will be found within the provisions of the "Loan Shark" law, D. C. Code §§ 26-601 et seq. (1961).

I mention such matters only to emphasize the desirability of a cautious approach to any such problem, particularly since the law for so long has allowed parties such great latitude in making their own contracts. I dare say there must annually be thousands upon thousands of installment credit transactions in this jurisdiction, and one can only speculate as to the effect the decision in these cases will have.

I join the District of Columbia Court of Appeals in its disposition of the issues.

W. T. GRANT COMPANY

v.

WALSH

100 N. J. Super. 60,
241 A.2d 46 (1968)

APPLEBY, J. C. D. C.

Plaintiff sues on a contract for the establishment of a retail installment sales account.

Defendant Janet P. Walsh entered plaintiff's North Brunswick store on June 13, 1967, for the purpose of purchasing sneakers for her two small boys, who accompanied her. While approaching the checkout counter, where she paid cash for her purchase, she was accosted by a saleslady, who inquired whether she desired to open a charge account. Mrs. Walsh declined, but the saleslady persisted, pleading that she would be awarded points in the credit department. Mr. Walsh's name and address were written by Mrs. Scott on a form entitled "retail installment sales contract, GRANT'S CHARGE-IT PLAN", together with payment terms for an account of $200.00, plus interest for two years, carrying charges and insurance, all to be amortized at $10.00 per month, beginning one month from date. Clause L represented that Mrs. Walsh's husband had authorized her to sign and that both accepted liability for the purchase of family necessaries. Mrs. Walsh signed and was given a book of coupons of various denominations totaling $200.00, good for purchases in any of plaintiff's stores, all numbered and stamped "Void if detached." Mrs. Walsh testified that the entire transaction took five to seven minutes, during which she was distracted by her children; that Mrs. Scott did not explain the details of the plan; that Mrs. Scott told her that the coupons worked basically the same as a charge plate, and that she would be charged as they were used. Mrs. Scott testified that she told Mrs. Walsh: "You only pay for what you buy out of the coupon book", and asked her: "Will $10.00 a month be all right." Mrs. Walsh understood this to mean the monthly payment after making purchases.

That evening Mrs. Walsh's small son ripped some coupons from the book, and she destroyed them all in the belief that they were now void, and that, in any event they were meaningless unless used. Mrs. Walsh failed to make the first payment on the account, and suit was instituted against her and Mr. Walsh.

Plaintiff's credit manager testified that redeemed coupons were never checked or centrally cleared, but simply destroyed monthly. He also indicated that plaintiff had other credit plans, and that Mrs. Walsh personally qualified for a regular charge plate account. Subsequently, prior to trial, Mr. Walsh disavowed in writing by certified mail his wife's authority to bind him.

Defendant contends that Mr. Walsh was not bound by Mrs. Walsh's signature and that there was failure of consideration, fraud, and usury in the transaction.

Paragraph L of the contract signed by Mrs. Walsh states: "Buyer if over 21 and married, represents having authority from spouse to sign this retail installment sales contract and both accept liability, whether separated or divorced, for all purchases of family necessaries by means of coupon books or services purchased herein before notice is sent to seller by certified mail."

Plaintiff contends that this binds Mr. Walsh through the creation of an agency by estoppel. Quite aside from the general defenses of fraud, etc., defendant Mr. Walsh contends that he never saw the contract until he was served with the complaint. There is no basis for plaintiff's assumptions that Mrs. Walsh took a copy home and showed it to him.

Clause L specifically provides that both spouses accept liability for purchase of family necessaries. In the absence of any method for determining whether the coupons were ever spent, it is obviously quite impossible for plaintiff to prove that they were spent for necessaries. In any event -- and quite apart from Mr. Walsh's obligation, even in the absence of express agreement, to be bound for his family's necessaries -- he could not be bound by Mrs. Walsh's signature in the absence of notice.

In denying the defense of usury, plaintiff asserts that N. J. S. A. 17:16C-41 controls the rate of charges on its time price differential under retail installment sales. Not so. This statute refers only to contracts for the sale of goods, which are defined in N. J. S. A. 17:16C-1 as "All chattels personal having a cash price of $7500.00 or less, but not including money or choses in action or goods sold for commercial or business use." Defendant here received no goods or chattels, but only coupons or "scrip" intended to be used as money. Therefore, this transaction was governed by N. J. S. A. 31:1-1, the general usury statute, which established a maximum interest rate of 6%. The rate charged here is therefore usurious.

Plaintiff contends that, even if the transaction is found to be usurious, it is still entitled to a judgment for the amount of the claim without interest. Again, not so. Defendant pleads failure of consideration and fraud.

What did Mrs. Walsh receive for her alledged agreement to pay $246.01 over 24 months? A book of coupons entitling her to purchase $200.00 worth of goods from the plaintiff on credit. If the cupons were lost or stolen, destroyed, or detached from the book prior to use, she still had to complete payments, and plaintiff would be the richer by the amount of the loss without having supplied anything in return. Actually, all that plaintiff has done for defendant is to agree to sell her goods on credit at some time in the future.

Mrs. Walsh understood that she was applying for the usual type of charge account upon which there would be no payment until she made a credit purchase, and that she would then pay a maximum of $10.00 per month. Mrs. Scott told her "It's like a charge account" and "You only have to pay for what you buy." These statements were clearly untrue and were relied upon by Mrs. Walsh. Mrs. Scott testified that she ahd a "spiel" to sell the "scrip", and the entire presentation was obviously cleverly designed to obscure the real nature of the transaction. These untruths and half-truths constituted fraud.

It is clear that the contract entered into was based on mutual mistake, even if all the evidence is interpreted most favorably to the plaintiff. Mrs. Walsh thought she had arranged a normal credit plan, and plaintiff's agent supplied her with a coupon account.

Plaintiff's attorney, in his oral argument, also pleaded that defendants would be unjustly enriched by a decision adverse to his client in that they might still have the coupons or might have spent them. Unfortunately, plaintiff will never know whether the coupons are spent, and will never be able to prove unjust enrichment, unless it establishes a clearing operation to check the coupons. Its greed has carried it beyond the bounds of an unconscionable agreement to a point where its desire to even economize on clerical expense thwarts its own proofs.

It is difficult to imagine a more one-sided scheme for the enrichment of a commercial establishment at the expense of a potential customer. Mrs. Scott testified that the plaintiff preferred the coupon plan -- for obvious reasons. Christmas Clubs are criticized because no interest is paid on the participants' savings. This coupon plan not only pays no interest on money advanced but even charges the potential customer interest on his account before he makes any purchases. And the store has the additional happy chance of realizing the full value of the coupons if they are stolen, lost, destroyed or detached before being used. The Court is of the opinion that this plan is, in addition to its other faults, against public policy.

There will be a judgment for the defendants on the plaintiff's suit, with costs.

David Caplovitz makes the following comments about the use of legislation as an instrument to change the abuses of the low-income consumer.

Consumer Protection Through Legislation*

Apart from efforts to change the attitudes, knowledge, and practices of the low-income consumer, consideration should be given to modifying the system of marketing in which he now finds himself.

Nowhere are the laws protecting the rights of consumers in time sales as fully developed as in New York State. Nevertheless, this study has found that even this advanced legislation does not meet the needs of many low-income consumers. The problem lies not so much in the failure of the legal structure to establish their rights as in the failure of these consumers to understand and to exercise their legal rights. The legal structure is based on a model of the "sophisticated" consumer, not that of the "traditional" consumer prevalent among low-income families. It assumes, for example, that the consumer understands the conditions to which he is agreeing when he affixes his signature to an installment contract. But we have seen, time and again, that this assumption does not hold for many of these consumers. Some have no understanding of the principles of a chattel mortgage. They do not realize that they are still liable for a debt even after their merchandise has been repossessed. The law that entitles the merchant to sell repossessed merchandise and deduct the sales price from the debt is not readily understood by the family that finds it still owes money even though it no longer has the merchandise. And some families have no understanding of their obligation to pay interest on their unpaid debts. Still another area of confusion for many low-income families is the legal provision which entitles the merchant to sell the contract to a credit agency. As we have seen, a frequent result of this practice is to free the merchant of his obligations to the consumer, not because the law gives him this right, but because the consumer misunderstands what has happened.

Not only do these consumers have difficulty understanding their rights, they are also poorly qualified to know when their rights have been violated. Merchants are able to pass off reconditioned merchandise as new, for example, because their customers are too in experienced to know the difference.

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* "The Poor Pay More," pp 188-192. Footnotes edited and renumbered.

The present legal structure thus falls short of its goals because its image of the low-income consumer is not correct. As a result, it unwittingly favors the interests of the merchant over those of the consumer by permitting deviant practices which take advantage of the consumer's ignorance. We have already noted one such practice, the institutionalized evasion of "sewer service." Still another evasion of legal procedure often follows upon the judgment against the defendant. At this point the law requires that the property of the defendant be attached. Only when the defendant does not have property that can satisfy the debt can his salary be garnisheed. The responsibility for carrying out the court's judgment rests with the City Marshal. City Marshal (there are forty-five of them in Manhattan) are appointed by the Mayor. They are essentially the collection agents of the law. (Unlike civil servants, they are not paid salaries; instead their income is derived from fees. The procedure is for the plaintiff, or rather his lawyer, to get in touch with a Marshal of his choice.) They are supposed to satisfy the judgment by attaching the defendant's property and arranging for its sale. If the defendant does not have any property that can meet the debt, the Marshal will return the judgment to the court as "unsatisfied." Then, and only then, does the law permit a garnishment. In practice, City Marshals sometimes neglect to investigate the defendant's property. Instead, they return the judgment as unsatisfied, and move directly to the next step, the garnishment. It is the combination of "sewer service" and this practice on the part of some Marshals that accounts for the fact that consumers sometimes never learn of the action taken against them until their employers notify them of the garnishment. And by that time it is often too late for the consumer to protect his job, let alone his rights in the legal action.[1]

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[1] In 1964, the law was changed; the creditor now has the option of obtaining a garnishment order without first attaching property. But abuses of the law still persist. The City Marshall is required to send the defendant a no-

It is instructive to contrast the legal machinery dealing with the consumer defendant with that dealing with the juvenile defendant. Enlightened public opinion has led to the emergence of legal arrangements for juvenile offenders which, if biased at all, favor the defendant rather than the plaintiff. The juvenile defendant is regarded as not fully responsible for his actions. The environmental pressures which shape his behavior are taken into account when his behavior is assessed. The emphasis is upon rehabilitation rather than retribution; the first offender is frequently let off with a warning, and the courts try to provide the defendant with professional services to aid in his rehabilitation. The findings of this study suggest that some of the general assumptions made about the juvenile defendant also apply to many low-income consumers. They, too, are not fully responsible for their actions. Poorly educated, intimidated by complex urban society, bombarded with "bait advertising," they are no match for high-pressure salesmen urging heavy burdens of debt upon them. Perhaps legal machinery can be instituted, which takes these facts about low-income consumers into account.

Since many problems of low-income consumers stem from their being pressured into credit commitments beyond their means, the question arises whether this activity can be controlled by legislation. Under the present system, the merchant alone makes the decision whether or not to extend credit; and as one merchant put it, "extending credit is not our responsibility, it is our risk." Since the mer-

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tice of garnishment twenty days prior to sending the garnishment order to the employer. The purpose of this law is to give the defendant a chance to settle the debt and thus avoid trouble with his employer. But many of those whose wages are garnisheed claim that they never receive this notice. Moreover, "sewer service" is still a serious problem in New York. In 1966, Attorney General Lefkowitz held hearings about this and considerable evidence was presented showing that "sewer service" is widespread in consumer and landlord-tenant cases; yet efforts to change the law to improve service of process have so far failed.

chant does not accept the responsibility and many low-income consumers lack the training for responsibility, how can responsibility be built into the system. One solution would be to establish by law minimal credit requirements that must be met by all consumers. The merchant now does not feel particularly responsible, because he knows he can count on the law to back his claims against the defaulting debtor. If the merchant were unable to have legal redress against customers who fail to meet the requirements of reasonable risks, he would scarcely be as eager to pressure such families into buying on time.

Another way of changing the low-income marketing system would be to enact laws regulating prices. If the merchants were forced to accept lower markups than they now enjoy under their "number" system of pricing, they would be unable to offer the "easy credit" plans they now do.

It is possible, however, that even if such laws were feasible, they would not fully accomplish their intended objectives. Instead of forcing poor risks to curtail their consumption because the merchants would no longer extend them credit, such laws might only stimulate deviant patterns worse than those now in effect. For example, as their credit in local stores dried up, more families would probably turn to the peddlers, who depend almost entirely upon personal, rather than legal, controls. Enforcing laws pertaining to peddlers is not an easy matter, for these men are highly mobile and not readily apprehended. Also, some families might turn to loan sharks for the money that would enable them to buy for cash. Obviously, there is no simple solution to the ills of the low-income marketing system. But this should not deter efforts to reduce the abuses of the system through legislation.

In the final analysis, the consumer problems of low-income families cannot be divorced from the other problems facing them. Until society can find ways of raising their educational level, improving their occupational opportunities, increasing their income, and reducing the discrimination against them -- in short, until poverty itself is eradicated -- only limited solutions to their problems as consumers can be found.

APPENDIX B

WRITTEN ASSIGNMENTS PROBLEMS AND GAMES

Written Assignment # 1. Urban Legal Process. The following assignment should be given during the first week of class. The problem should be read to the class twice and the class then given time to ask any questions about the facts that it wishes. Be sure to explain clearly before you begin exactly what you want the students to do with the fact situation that follows.

INSTRUCTIONS:

1. Write the fact situation in a manner as clear and concise as possible. Leave out what is unnecessary and keep in everything that you feel is vital. A fact situation for our purposes is simply an exposition of the facts that you think are in any way relevant to the legal process.

2. Using complete sentences, list all of the possible problems or questions in the following situations with which the legal might deal.

3. Tell which of the three branches of the legal process, legislative administrative or judicial, would be most appropriate or efficient for dealing with each of the problems you have listed and explain why. You may indicate alternative courses of actions for the problems that you find.

FACTS:

The City of Chicago wants to build two high rise public housing units each holding 500 apartments. They plan to put it between two neighborhoods. One side of the prospective public housing site is a poor black neighborhood with 3,000 public housing units already there. The neighborhood has a high crime rate, many bars and severely overcrowded schools. The other side of the site for the new public housing units is an integrated neighborhood which has maintained a stable racial balance for 15 years. The integrated neighborhood has only single family dwellings and has a high school with a teacher student ratio of 1 to 10. The city has no integrated housing projects. The Housing Authority says that they simply let the tenants choose the project in which they wanted to live and that they do not have any policy of discrimination. The newspapers in the city are against the project on the grounds that the high rise public housing units built in the past have been dismal failures in terms of the quality of life they have provided and that no more should be built.

Melvin Middleclass is a black attorney who lives in the integrated neighborhood. He has just purchased an $80,000 home. He is against the public housing project because he is afraid that the land value in his neighborhood will go down if the project is built. He has a family of four.

Wilma Welfare lives in a public housing project. She is unmarried and has seven children. One month ago her 12-year-old son broke some windows in her apartment. Miss Welfare has just helped to form a tenants' union of which she has been elected president. The tenants' union is protesting what they say is a policy of segregation in putting all black public housing units in black neighborhoods only. They are also protesting the building on the proposed two high rise units on the grounds that the neighborhood is already overcrowded. Yesterday she received a notice of eviction effective next week. The notice itself gave no reason for the eviction.

Robert Racist is also protesting the project. He doesn't want any of his tax money to be used to pay for public housing at all. He plans to withhold 1/10 of his city sales tax and federal income tax so that it won't be used in any way to support the project. He belongs to the White Citizens Council and is a blue collar worker.

WRITTEN ASSIGNMENT NO. 2

1. Here are two parts of the C. R. Act of 1964. Briefly explain what each of the two sections mean. That is, what do they require or prohibit? Or, to put it another way, who is going to do what to whom, when and how?

2. Decide whether one, both or neither of the statutes applies to the following situations and explain your reasoning.

   Always use complete sentences. Be sure and tell which part of the section is controlling.

   A. The Georgeous George Wallace Motel solicits guests only from Georgia, but is located on a busy interstate highway and specializes in parking and service for huge trucks. It refuses rooms to Negroes.

   B. Bob Shelton's B'Que has a big sign outside which reads private club for anyone who loves grits. Bob refuses to serve anyone who is not white. He hires only black cooks.

   C. The University of North Carolina has received money from HEW to build a new gym. Their contractor tells the union how many carpenters he needs and the union sends over the men. They are all white. There is not now has there ever been a black man in the union. All contracts required union labor.

   D. Mrs. Wasp keeps boarders in her house. She has four rooms and will not rent to Indians.

   E. Gordy Goodguy gets a loan from the U. S. Small Business Agency to open an art theater in his home capable of seating 100 people. He advertises in the Carolina Times and charges $1.00 to see sports films. He admits no whites to his theater and has a policy of hiring only black women with Afros as ushers.

   F. Dr. Jeff Davis rents his medical offices in the municipal building in the town of Little Ole, Miss. He has separate water fountains for blacks and whites.

1. The Civil Rights Act of 1964

a. Prohibitions and Exemptions

TITLE VII

Sec. 703. (a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin.

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities, or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an em-

ployer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or re-training, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training....

(e) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number of percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organizations, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national originis a bona fide occupational qualification for employment.

D. The Civil Rights Act of 1964

TITLE II

78 Stat. 241, 42 U.S.C. Sec. 2000a et seq.

Sect. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommondations of any place of public accommondations, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Each of the following establishments which serves the public is a place of public accommodations within the meaning of this sub-chapter if its operations affect commerce, or if discrimination or segregation by its is supported by State action:

(1) any inn, hotel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including but no limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which moves in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof.

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section. . . .

Sec. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Sec. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 - 202.

Sec. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

(b) In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person

(c) In case of an alledged act or practice prohibited by this subchapter which occurs in a state, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) of this section before the expiration of thirty days after written notice of such alledged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

(d) In the case of an alledged act or practice prohibited by this subchapter which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a) of this section: Provided That the court may refer the matter to the Community Relations Service established by subchapter VIII of this chapter for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: Provided further, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.....

Sec. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) singned by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case...(I)t shall be the duty of the judges so designated to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

Sec. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subchapter and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

(b) The remedies provided in this subchapter shallbe the exclusive means of enforcing the rights based on this subchapter, but nothing in this subchapter shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this subchapter, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy civil or criminal, which may be available for the vindication or enforcement of such right.

WRITTEN ASSIGNMENT NO. 3

Draft a statute to deal with the following problem. Be sure to carefully analyze all of the elements in the issue with which you want the statute to deal before you decide what to do with them.

A large number of people in the state are unhappy with the consumer credit situation. Here are some examples of the kind of situation which produced the dissatisfaction:

Mrs. Smith wanted some new furniture. She went to the E-Z Credit Furniture Store and picked out a couch, 3 chairs and 2 tables. They sold for $50 down and $40 a month for 36 months. The salesman carefully explained that she would have to pay the $40 for 36 months and she signed the consumer credit contract. Mrs. Smith can read. It also had a confession of judgment. The cash price of the furniture was $200. She never asked and was never told this. Mrs. Smith was on welfare and got $100 a month. That was her whole income.

Mr. Jones bought a color TV set. He also signed a consumer contract. The salesman at the furniture store explained very carefully the terms of the contract because Mr. Jones doesn't read very well. The terms were $50 down and $40 a month for 24 months. Mr. Jones knew that the cash price was $400, and that he was also agreeing to put up his car as additional security. Mr. Jones defaulted on the last payment and the TV set was repossessed. It was broken and they also took possession of his car.

Oswald Owner is being attacked by the neighborhood C. A. P. because the prices in his store are too high. He says that the rate of default on credit contracts is so high that his mark-up is the only way that he can keep in business.

Sam Swinger, 18, was just graduated from high school and needed some new clothes for his job. He bought them on time, and signed a consumer credit contract which included a confession of judgment. He defaulted after the first payment. In his state, men can be married at 18, but cannot vote until age 21.

CONSUMER CREDIT - PROBLEM A

HOW THE LEGAL PROCESS IS INVOLVED IN CONSUMER PROBLEMS.

Analyze the following situation to determine all of the points at which the legal process might be or should be involved.

Sheily Silly is 18 years old and has been married for three years. She and her husband, Billy, have three children. Billy is an orderly in the community hospital and makes $4,000 a year. Neither Sheila nor Billy has graduated from high school, but both went through the 8th grade and can read and write. One day while Billy is at work Sheila is visited by Sam Supersalesman, a door-to-door salesman who tells her that she has been chosen as the only one in the neighborhood eligible to buy a set of magnificent Queen Sadie China for a special introductory price. Sheila explains that she would love to have the china but doesn't have any money at all. Supersalesman, magnanimously agrees to give her credit and gives her a piece of paper which he tells her is a credit agreement. Sheila, having by then looked over the china carefully, signs the paper though she doesn't read it. Then Sam tells her that she will have to pay $5 a week for the china and that her set will be delivered the next day. Three days later the china comes. Half of the dishes are broken, the others are made of plastic and not like the Queen Sadie China that Sheila was shown by the salesman. Her husband tells her to send it back. The next day Sheila calls the china store but is told that Sam is out and he will call her back. Although she calls him back several times, he is out and she finally gives up. She uses the dishes after a few weeks. At the end of the month Billy gets a payment book indicating that the first $25 payment is due. (Five a week for the china and five a month for handling charges and the time price differential). He calls the finance company and tries to tell them about the china but they refuse to talk to him, telling him that his complaint should be directed to the store and not to them as they do not sell china. Billy calls the store himself and gets no answer. He never pays any of the payments. Four months later his boss at the hospital tells him that his wages have been garnished and that if he doesn't clear up the problem immediately, he will be fired because the hospital doesn't want to handle the paperwork. Billy sits down to read the contract that he got with the payment book and finds that in addition to binding Sheila for the payments, the contract indicated that Sheila also agreed to bind him to the credit agreement. He comes to you, a worker at the neighborhood school where his kids go to kindergarten, for some advice.

CONSUMER CREDIT PROBLEM B

You are a lower court judge sitting in on the following cases. Decide which party wins the case and give your reasons. Then determine what theory of consumer-seller relations you have been applying and discuss its strengths and weaknesses in contemporary society. (For example, is the debtor favored so heavily that sellers will stop the credit business? If so, is that a socially desirable goal?)

A. Charles Johnson has just graduated from high school. He accepts a job as a shoe salesman and decides that he needs a new wardrobe in order to make the proper impression on his customers. He goes to a neighborhood mens' wear shop and purchases a new suit, five shirts, three ties and a new sportcoat. The entire bill comes to $256. Johnson does not have that large a sum of cash and decides to buy the clothes on credit. The salesman tells him that he can have it for $50 down and $20 a month for 24 months. Though the salesman does not mention it, the contract reads "TIME-PRICE DIFFERENTIAL: $274." Charles signs the contract without reading it. He takes the clothing with him. Two months later he stops making his payments, and when approached by representatives of the store he says that if they want to they can come get the clothing back. After three months of attempting to obtain payment, the store comes into court asking for an order to garnishee Mr. Johnson's wages.

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B. Clara H. Frau is doing her housework one day when a peddler comes to the door of her apartment. He says that he wants to demonstrate a new vacuum cleaner and that he will pay her five dollars for the chance to demonstrate it. Clara, who has completed the second grade, lets him in and decides to buy the vacuum after the peddler tells her that it will cost only $1.00 down and $2.00 a month. She signs a blank paper that the peddler tells her will be filled in by the secretary at the store and keeps the payment book. The payment book indicates that her payments are to be $5 a month for 36 months, that the actual cost of the vacuum cleaner is $50 and the finance charges $130.* She sends in the $5 for the first three months and then stops because the vacuum doesn't work any longer. The finance company which bought her contract has garnisheed her husband's wages and he comes into court asking for an injunction that will stop them.

*The book also indicates that she commits her husband to make the payments.

* * * *   * * * *

C. Five weeks ago plaintiff Lucy Miller received a call from Defendant Smith. D. Smith claimed that Miss Miller owed his corporation $75 through assignment to them of a prior debt of Miss Miller and threatened to seize all of plaintiff's furniture unless immediate payment was made. Miss Miller said that she didn't owe anyone anything and hung up. During the next five days the defendant called the plaintiff repeatedly at all hours of the day and night threatening to call her employer if the money was not paid immediately. The D told Miss Miller's children that they would see that she lost her job if she didn't pay and that they were coming to take all of the furniture in the house as well. At that point, the defendant called Miss Miller's employer and told her that Miss Miller was in "bad trouble" because she owed a lot of money around town. The employer told Miss Miller to clear up her debts by the next day or not come back to work. Miss Miller, through her attorney, wants the court to enjoin the activities of the defendant and grant her damages. It is stipulated by both parties that Miss Miller does owe the defendant $75 and has owed that amount of money for 8 months.

* * * *   * * * *

D. Wilma Welfare is an unwed mother receiving Aid to Dependant Children from the state department of Public Aid. Miss Welfare has graduated from high school. Her total income each month is $256. She decides that she wants to have a new couch to brighten up her apartment. Since she already has a couch, the welfare agency will contribute nothing to her purchase. Miss Welfare went to a neighborhood store known for its easy credit and purchased a new couch. She read the contract carefully. It included the following statements, "Finance Charges: $300. Merchandise: $250. Payable $10 per month for 55 months. The undersigned has read and clearly understands that amount of the monthly payments as well as the amount being paid for credit. She gives her TV set and her freezer as collateral." Miss Welfare signed on the dotted line and the couch was delivered. Ten months later she stopped the payments because she felt that she couldn't afford them anymore. The store repossessed the couch which was in poor condition because Miss Welfare's children had jumped on it and loosened the springs and badly soiled the fabric. They sold the couch for $25 and are asking the court to order the sheriff to pick up the freezer and the TV set.

CONSUMER CREDIT PROBLEM C

You are a social worker with the use of a legal aid bureau in your neighborhood. A number of your recipients have recently purchased cut-rate sewing machines, on credit from the Fantastically Easy Sewing Machine Company of America. In 23 cases that you know the machines have failed to work and the finance company that purchased the credit agreements (the Fantastically Easy Finance Company of America) is trying to get money from your people. What would you do about the immediate problem? What might you do to insure against such activity in the future?

CONSUMER CREDIT PROBLEM D

The state legislature is considering a Debtor-Creditor Act which includes a provision voiding any contract for non-essential goods if the buyer has an income of less than $75 a month for a single person; $100 a month for a married couple, and up to $300 a month at the rate of $25 per dependant. The provision also operates as to any person receiving welfare, regardless of the amount. Putting aside any constitutional questions:

A. You are the head of a community action group in a low income area asked to testify on the bill. If you do not agree with it you are asked to draw a bill which protects low-income consumers from over-buying on credit. Prepare your testimony and if necessary a substitute bill.

B. You are the president of the low-income neighborhood's retail merchants association. What would your testimony be? If necessary what would your suggestion be for legislation in the area or would you favor no legislation at all?

C. You are the manager of a local finance company which buts a great amount of consumer credit paper. What would you testify? Would you feel the need for legislation in the area? If so, what would your recommendations be?

Housing Problem. A.

Your city has a housing code which simply requires that there be adequate sewage disposal. The city council has decided to draft a new housing code and is soliciting suggestions.

You are the head of a community action organization whose members, mostly low-income rental tenants, want to make sure that their concerns are part of the final code.

Draft a suggested housing code dealing in non-technical terms (It is enough to suggest that you need reasonable heat or light without indicating the technical peramitersk) with the standards that you want to have enacted, as well as the possible means of enforcement.

Housing Problem B.

The tenants in a building with 100 families have come to you for help. They have formed a tenants union and want you to give them some idea of the sort of collective bargaining agreement they should present to the landlord. They have had particular problems with sanitation, heat, and in getting through their complaints to the landlord. Draft a model agreement indicating all of the responsibilities that you think both parties should accept and also dealing with the problem of enforcement.

Urban Legal Process
Legislative Lobbying Game

INSTRUCTIONS:

Each of you has been given a slip of paper indicating the role that you are to play in the following interaction. The instructor has no role. I will read the fact situation about which the game revolves shortly. You have been divided into five rough groups, legislators, members of the Veterans of Foreign Wars, members of the Association of Public Aid Workers, Representatives of the State Chamber of Commerce.

As groups and/or individuals you will have twenty minutes to reach a position on the following issues. You will then have thirty minutes for lobbying. Tomorrow you will have ten minutes to recognize and make any last minute contracts that you wish. There will then be thirty minutes for the legislative session in which debate and voting will take place. Your success in the game will be determined on the third day when the class will analyze the success each of the lobbying groups has in influencing the legislators by looking at their vote. The legislator's success will be measured by the class serving as their constituency being given a chance to calculate the response that the constituency would have to the statements and vote of each legislator during the previous day.

ROLES (For a Class of Thirty.)

5 members of the National Welfare Rights Organization.
5 members of the Veterans of Foreign Wars.
5 members of the Association of Public Aid Workers.
5 Representatives of the State Chamber of Commerce.

10 Legislators from the following districts.

Democratic legislator from Blue Island, Illinois. Blue Island is a small town outside Chicago. There is some integration in the town. 80% of the population consists of blue collar workers, most of whom work for the Railroad. The median income from a family of four is $5,000.

Democratic Legislator from Chicago's Old Italian Neighborhood. The area is predominantly older people whose median income is about $4800. There are some black families now moving into the neighborhood.

Democratic Legislator from Chicago's Hyde Park neighborhood. Hyde Park is an integrated middle-class neighborhood surrounding the University of Chicago. Hyde Park itself is surrounded by an almost all black low-income area. The median income in Hyde Park is $15,000 and many of the residents, black and white, are professional people. Many university faculty and students also live in the area.

Democratic Legislator from Chicago's West Side. The West Side is an all black low-income neighborhood, with high unemployment. The median family income for a family of 4 is under $3,000.

Democratic legislator from the North Shore of Chicago. This is a predominantly white, but integrated, neighborhood composed mainly of large expensive apartments. The median income for a family of 4 is $20,000. Most of Chicago's wealthy black families live in this area.

Republican Legislator from Cicero, Illinois. Cicero is a suburb of Chicago. There are almost no black residents. The median income for a family of 4 is $7,500. Many of the men work in the building trades.

Republican Legislator from Cairo, Illinois. Cairo is a small town in Southern Illinois. There is an active John Birch Society in the town. There are some black citizens and a large number of very poor white citizens who are composed equally of people who have lived in the town for a number of years and of people who have recently left the more rural areas of the state.

Republican Legislator from Champaigne-Urbana, Illinois. Urbana is the home of the University of Illinois. The city is integrated and there is little unemployment. Much of the town's economic life is centered on the presence of the large state university. There is a growing all-black neighborhood with severe housing and sanitation problems.

Republican Legislator from Lake Forrest. Lake Forrest is a very wealthy Chicago suburb. There are no black home owners, but some black families live near the center of town. The median income for a family of 4 is $25,000.

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Republican Legislator from Peoria, Illinois. Peoria is a rapidly growing city in Illinois with a large steel industry. Unemployment is beginning to be a problem because the steel mills have been laying off some recent employees. There are both poor white and poor black families, but most of the town consists of lower middle class working families. The median income for a family of 4 is $7500. Many of the recent arrivals to the town are black.

THE ISSUE:

A bill has been introduced into the Illinois state legislature which would change the state's present public assistance law by allowing Aid for Dependent Children to go to families with "an unemployed or permanently disabled father so long as he agrees to, and in fact does, report for job re-training." Under the old laws, no assistance was given to families with any man in the house.

The appropriate committee of the legislature has voted against the bill on the grounds that there is a finite amount of state money available for public assistance and that the new bill would simply deprive the families already receiving aid of some money in order to add the others to the welfare rolls. There is a Personal Income Tax in Illinois.

APPENDIX C

CLASS DIARY

APPENDIX C

Urban Legal Process: Representative Class Diary.

During the 1969-70 academic year, Shaw University operated on the term system. The term consisted of about nine weeks of teaching four hours each week. Urban Legal Process was taught twice as a one-term course, the first offering during the Winter, 1970 term, the second during the Spring, 1970 term (The second term was rather severely shortened due to time lost from classes to a university-wide teaching and other activities).

The original plan to teach the course as a two-term course was not carried out because of three reasons: First and most importantly, it was predicated upon the assumption that there would be an operating legal services clinic on the campus which would serve as a laboratory for observation and a stepping off point for certain sorts of practicum oriented assignments and projects for the students. The legal services clinic was not in operation during the year and thus, one of the most important reasons for extending the course was not a reality. A second reason for the one-term course was a mistake in counseling students during the registration period. None of the students registered for the course anticipated in their scheduling spending more than one term in the course. Finally, the investigator thought it might be equally valuable to run through the same portion of the materials twice during the grant, which teaching the course twice as a one-term course enabled her to do.

It should be noted, however, (see the section IV) that the course does appear to need more time than the term offers. This can be handled in various ways. Shaw is going to the semester system and the course will be lengthened to a one-semester course which should be adequate. Another method would be to teach the course for two consecutive terms or quarters depending upon the institutions academic calendar.

The following outline is an attempt to show what kinds of materials were covered in the class hours. It includes a brief indication of the methods that were used. The time is indicated by listing weeks one through nine and in each week classes one through four.

Week One.

Class 1. Nuts and Bolts. A discussion of the administrative procedure of the course. What will be required in the way of attendance, papers, readings, class participation and examinations. An explanation of the reasons for any rules and of the methodology and the rationale of the course. Explain that papers are due on the date assigned and will not be accepted late because in the legal process, keeping deadlines is imperative for the welfare of the client. Example of eviction or notice to appear in court, or deadline for testimony before a legislative committee or school board. Students as organizers or professionals in the community must be able to operate in a legal and administrative framework in which non-adherence to deadlines by them may mean harm for the people they are supposed to help. So, students will be expected to operate in the same processional way in class. Class participation and attendance is important in this class because of two reasons: First, in the main we will cover things not dealt with in the reading materials. Secondly, and more importantly, one of the purposes of the course is to teach analysis, not just written analysis but thinking on your feet and responding to questions and intellectual questioning of both the instructor and your colleagues. Analysis, like playing basketball, takes practice and can't be achieved, even from reading a how-to-analyze brilliantly book.

Legal analysis takes even more practice. It is especially important to learn to see the flaws in your own arguments and opinions before your opponents do in order to protect those for whom you are working from your own blind spots. It is training of this sort that we are going to try to achieve in class. You can't get the training or the practice if you don't come and I can't observe the results. Class discussion on the above points (heated).

Class 2. A discussion of the reasons for the course. An understanding of the entire legal process, the legislative and administrative process as well as the judicial. An attempt to show that it is possible to use the system as an instrument of social change, to show how it has been done in certain areas, particularly in the housing and consumer credit, to show how much more might be done to discuss the flaws in the system and how they can be corrected.

Discussion of how the legal process affects the students every day lives, and examples of the legal process at work. First suggestion is always in the criminal area. Then get to administrative procedures such as the draft, drivers licenses, income tax. Finally, legislative process, 18-year-old vote example, change in the selective service system.

Class 3. **Other examples of how the legal process works. Welfare and automobile accidents. Then try to draw some generalizations about why the process is at work in each of the examples that has been discussed. Why do we have any legal process at all? When did the first sorts of legal processes start among civilized men? African tribes? Is religion a legal process?**

Class Four. What then is the common theme of the legal process? In general, it is the device by which a society settles conflicts. In our society, conflicts between individuals, between groups, and/or individuals and the state are all solved by and prevented by action of the legal process. In general, we think of judicial process as solving those disputes which already exist in clearly definable terms; that is, exist as a "case." The legislative process as dealing with more general conflicts about the direction of the society and how to avoid conflicts in the context of legislation that will operate in the future. The administrative process deals in both ways with conflicts. It tries to settle specific disputes which come under its preview (for example, a welfare department may hear a recipients complaints about the size or kind of aid she is receiving), and may also write regulations to deal with classes of situations. All are alternatives to force. This alternative is particularly important in the United States which is a society heterogenus as to race, religion and cultural heritage. Why the urban situation poses special problems to the legal process.

First assignment. Introduction and Levy on Legal Analysis.

Written Assignement #1.

Week Two

Class One. Legal Analysis. What it is. How applicable in life generally. Discussion of the Levy article. Explanation of how to brief a case and why a brief is important. (As a tool to help analyze the opinion). Very short discussion of what an appellate opinion is and an oral introduction to the Speluncian Case. Assign the Speluncian case.

Class 2. The Speluncian Case: What it is that is being read (a fabricated appellate opinion). A discussion of the facts. A discussion of the route which the case took to come to this stage. A discussion of what sort of value judgments and biased assumptions were being made by the students in their discussion of the facts.

Class 3. The Speluncian Case: An Analysis of the judges' opinions. Judge by Judge. Done through Socratic Method. Much discussion by the students of their classmates' opinions.

Class 4. The view of the judicial process and the role of judicial function indicated by the opinions of each judge in the case. A criteria of the case and the analysis.

Week Three

Class 1. A discussion of the First Written Assignment. Particular discussion on the kind of assumptions that the students made in their papers and the biases that they revealed. Discussion of what can be taken for granted (Nothing).

Class 2. Discussion of the substance of the first written assignment. What really is relevant to the legal process. For example, what difference to the process does it make that Mr. Middleclass has four children or, in his case, that he is Black? Why do we care what the newspapers think in terms of the legal process? Is the legislative process the fastest way to get things done?

Assignment for Reading: The legislative process section.

Class 3. Introduction to the legislative process. How does it work? What is its style? (elected representatives pass written legislation? Why written?) What is a law? What are the goals of legislation? What determines what the legislative process can do? (Constitutions). What are some of the flaws on the process that the students see? Racism? Why? Discussion of Baker vs. Carr and "One man, one vote." Why is legislative language so complex?

Class 4. The levels of the legislative process. Federal, State and Local. What are the differences? What are the practical problems of meshing the three? How does the legislature handle a specific issue? What is the way to handle the legislative process defensively and offensively? What would be your substitute for the process? Problems of too much centralization of government. Problems of too much decentralization in a mobile country. Particular problems of the Urban areas and the legislative process. Make Written Assignment #2.

Week Four

Class 1, 2, 3. Legislative Lobbying Game.

Class 4. Wrap-up on the legislative process. How it can be improved. The particular problems of the urban areas and the legal process. Particularly vis a viz the city and the federal legislative process.

Lobbying, Good or Bad

Assign the reading on the administrative and the judicial process.

Week Five

Class 1. Discussion of Written Assignment 2. Difficulties of reading legislative language. Where to go to find the laws. Renewed discussion of biases in hearing things and how to read them out. Introduction to the administrative process. What it is, examples. How it grew post-depression.

Class 2. The administrative process, how it works and who it is. How to manipulate and deal with the administrative process. Legislative and judicial controls of the administrative process. Is the administrative process responsive enough to the needs of those it is supposed to serve? Why we need an administrative process. The administrative process and urban problems. Housing laws and welfare in particular. Introduction to Legal Research.

Class 3. Trip to Law School library. Explanation of legal research and the role it plays in the entire legal process. Where to go to find a law. What a case report that is written is. How to find out what your rights in a particular situation may be (Go to a lawyer).

Class 4. Introduction to the Judicial Process. Brief lecture on the anatomy of the judicial system. Breakdown as to function (trial and appellate courts) and jurisdiction (federal and state courts). Role of the Supreme Court. The Constitution and the judicial system. Role of the judge. Role of the Jury.

Week Six

Class 1. The jury. Heated discussion about the jury system in this country. Discussion of the history of the idea of a "jury of your peers." What is it supposed to mean. What it actually means. Flaws in the jury system. Should all black people have an all-black jury and judge. What elements should be considered in picking a jury. Is race enough, for example. If so, what about the upper middle class Black professional as a juror for a black welfare mother. What about the adequacy of a system based on race as the only element. Is it good never to have black people judging whites?

Class 2. The jury system continued. Difference between a grand and a petit jury. The jury as injector of the human element into the process—widow and orphans vs. railroad situation? Class and economic background. Problems with hooding a jury when the trial is going to be many months long and the jury sequestered. The Jury and the press and publicity.

Class 3. The criminal judicial process. Copping a plea. The implications to the system. Deals made by lawyers. The role of lawyers in the judicial process. Constitutional rights.

Class 4. Mid-term.

Week Seven

Class 1. An introduction to the problem of housing in the urban situation. Why the problem of housing is particularly and remarkably different for the low-income city dweller. An insight into the history of the legal process and relationship between a man and his dwelling and the impact of that history on the contemporary housing scene.

Class 2. Who the parties in the housing situation really are. A discussion of the problems injected into identifying parties by such situations as the welfare department paying rent. Vigorous discussion of racial discrimination and its effect upon the problems of urban housing. Particular reference to the Kerner Commission Report.

Class 3. A brief discussion of the future role of the lay person in the legal process relating to housing problems. Questioning on personal problems. An analysis of the various possible responses and roles of each of the three parts of the legal system to the problem of housing.

Class 4. The lease and eviction. Historical background. Indication of the particular problems of the cities in which there is an overcrowded market for housing. Special emphasis on what continued black of access to legal counsel means in terms of the rights of tenants and how they are generally treated by landlords. Williams vs. Schaffer. West Haven Housing Authority vs. Simmons.

Week Eight

Class 1. Housing Codes. Why they came about and how they are supposed to work. Do they work? If not, why not? What are other alternatives? Bowles vs. Mahoney, Whetzel vs. Jess Fischer management assignment of problem on 101.

Class 2. Tenants' Unions. Their uses and misuses. Practical Problems in the Use of the tenants' union in the Urban Housing Situations. Limitations of the tenants, unions. Discussion of Problem on 101.

Class 3. The problem with Rent Withholding. How to effectively use housing codes on behalf of tenants. Brief discussion of the effectiveness of tort remedy. What to do when the landlord retaliates. Should you worry about retaliatory eviction before you do anything? Keeping the tenants best real interests in the forefront of the activity.

Class 4. Public Housing. How does we treat the housing authority? Private landlord or government agency? The perticular problems for public housing tenants. Who really deserves the condemnation for the problems of public housing in the urban situation? The constitutional issues in public housing. The future of public housing.

Week 9.

Class 1. Why the legal process is involved in the problems of the consumer. Why the problems of the consumer are more difficult to solve and to avoid in the urban situation. Racism and class in consumer problems. Who are the parties in the consumer credit transaction? A discussion of the mechanics and economics of financing. Assignment of Written Assignment 3.

Class 2. Poverty and the Consumer. Renewed discussion of the effect that clear inacess to legal counsel has on the workings of the consumer credit market. How the lay person can handle problems of consumer credit abuse. The Uniform Commerical Code and other legislative solutions to the consumer credit diliemna. Do we want to do away with the consumer credit as it now exists? What would be the impact in the urban situation? Any special impact on the low-income consumer?

Class 3. The Judicial Process and the Consumer, recent developments. A discussion and anaylsis of American Home Improvement, Williams vs. Walker Thomas and W. T. Grant vs. Walsh.

Class 4. Wrap-up. The Legal Process as an instrument of social change. Brief mention of other areas in which the legal process and the urban situation have special meaning for one another; civil commitment, the criminal process, the juvenile courts and welfare.

APPENDIX D

SAMPLE EXAMINATION QUESTIONS

APPENDIX D

Sample Examination Questions Used in Urban Legal Process

A. Fully brief the following case. Make sure that you indicate the parts of the brief by name and not by number.

Brown v Southall Realty Company
D. C. Court of Appeals
237 A 2d. 834 (1968)

Quinn, Judge.

This appeal arises out of an action for possession brought by appellee-landlord, against appellant-tenant, Mrs. Brown, for non-payment of rent. The parties stipulated, at the time of trial, that the rent was in arrears in the amount of $230.00. Mrs. Brown contended, however, that no rent was due under the lease because it was an illegal contract. The court held to the contrary and awarded appellee possession for non-payment of rent.

Although counsel for appellant stated at oral argument before this court that Mrs. Brown had moved from the premises and did not wish to be returned to possession, she asserts that his court should hear this appeal because the judgment of the court below would render certain facts res judicata in any subsequent suit for rent. In Bess v David, a suit by a landlord against a tenant for recovery of rent owed, defendant contended that he did not owe rent because he was not a tenant during the time alleged. The defendant was, however, denied that defense, this court stating on appeal that " ... we think any question of appellant's tenancy is foreclosed by the judgment in the previous possessory action."

(1) Thus, because the validity of the lease and the determination that rent is owing will be irrevocably established in this case if the judgment of the trial court is allowed to stand, we feel that this appeal is timely made.

Although appellant notes a number of errors, we consider the allegation that the trial court erred in failing to declare the lease agreement void as an illegal contract as both meritorious and completely dispositive, and for this reason we reverse.

The evidence developed at the trial revealed that prior to the signing of the lease agreement, appellee was on notice that certain Housing Code violations existed on the premises in question. An inspector for the District of Columbia Housing Division of the Department of Licenses and Inspections testified statutory prohibition designed for police or regulatory pusposes is void and confers no right upon the wrongdoer."

Applying this general rule to the Housing Regulations, it may be stated initially that they do provide for penalties for violations. A reading of Sections 2304 and 2501 infers that the Commissioners of the District of Columbia in promulgating these Housing Regulations, were endeavoring to regulate the rental of housing in the District and to insure for the prospective tenants that these rental units would be "habitable" and maintained as such. The public policy considerations are adequately stated in Section 2101 of the Regulations entitled "Purpose of Regulations." To uphold the validity of this lease agreement, in light of the defects known to be existing on the leasehold prior to the agreement would be to flout the evident purpose for which these Sections were enacted. The more reasonable view is, therefore, that where such conditions exist on a leasehold prior to an agreement to lease, the letting of such premises constitutes a violation of Sections 2304 and 2501 and that these Sections do indeed, "imply a prohibition," so as "to render the prohibited act void." Neither does there exist any reason to treat a lease agreement differently from any other contract in this regard. Thus for this reason and those stated above, we reverse.

B. Discuss the American judicial process explaining its structure, and the role you feel it plays in American society. Include an evaluation of what you think the failings are, if any, and how they might be corrected.

C.* Discuss some of the options in the legal process for dealing with substandard rental housing conditions. Explain how each option works and discuss the value and practicality of each option.

D. Explain how the jury is supposed to fit into the judicial process. What are the strengths and weaknesses of the jury system as it now exists? How would you correct any weaknesses that you see?

E. Discuss, compare and contrast the structure, function and style of each of the three parts of the American legal process.

F. What protections for individual rights against agency action can you find in the Administrative Procedures Act? Be specific as to section and be sure to explain why you chose a particular section.

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*Used in an open book examination.

G. What does Judge Wyzanski feel is the proper role for a trial judge in a non-jury case? Do you agree with him? If so why, if not why not.